





MATERIALS AND PROBLEMS

ON

LEGISLATION

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PREFACE

The materials for any course—Legislation included—do not gather or arrange themselves of their own accord. They are selected from an infinite variety of possible sources and pooled together to fit the editor's judgment of what ought to be accomplished, and how it is to be done. More often than not, the selectivity—to transpose Mr. Justice Holmes' classical version of a judicial decision—is based "on a judgment or intuition more subtle than any articulate major premise." Indeed, often it is so subtle that those who adopt prepared materials for classroom purposes—let alone the students—sometimes spend more time and effort than should be required of them in determining what the materials are intended to accomplish. Often, too, an author will edit his work on the theory that the more abundant and adjustable the materials, the better opportunity he affords the user to mold them to his own design. But this assumes, too readily, that those who are presented much and variegated material are already sufficiently oriented in the field to perform this function expeditiously. It is hoped that this volume on "Materials and Problems on Legislation" will escape both of these pitfalls, and yet be flexible enough to permit such adjustments in size and shape as are usually required by the purchaser of a ready-made garment.

Implicit in the arrangement of the materials in this volume is the assumption that the lawyer, in addition to being called upon to use legislative materials in the courts, must often battle for his client in the legislative arena; that such tasks call for specialized knowledge and skills; and that headway can be made in imparting some of the knowledge and in developing the related skills in an introductory course in Legislation. Seven of these tasks stand high on the list of those which would be found in a job analysis of the work of the modern lawyer: (1) gauging the efficacy of proposed legislation, i.e. ascertaining whether given legislative means will accomplish desired ends, (2) drafting legislation, (3) influencing and guiding legislative activity, i.e. engaging in those activities which are included within the permissible areas of lobbying, and counselling on matters of parliamentary strategy, (4) appearing before governmental agencies engaged in administrative legislation, (5) advising clients on their rights and duties before legislative investigatory committees, (6) ascertaining the meaning of ambiguous language when it is disputed in the courts, and (7) utilizing legis-

lative materials in advocacy. The teaching materials which have been organized in this volume to parallel these seven broad tasks and their sub-tasks are of the essay, case and problem varieties. The first two varieties need no special comment—being the mainstay of most of those engaged in the law-teaching profession. The third, i. e. the problem method, seems to offer at least a **partial answer** to those who have found difficulty in knowing just what to do in the classroom with those materials which do not lend themselves readily to “case” discussion. The complaint which seems most frequently to be registered is that, when the cases on statutory construction are exhausted, there is not much left which permits of class discussion and participation, and that the interest of the class lags in proportion to the extent to which the instructor resorts to the device of “lecturing.” If the experience of the editor is a criterion, the problem method is capable of yielding extremely fruitful results. It requires the student to deal with statutes and other forms of legislation as data for classroom discussion; it generates exciting argument, much of the same quality as one encounters in the Socratic discussion of a “case;” it enlivens dull legislative language; it makes more **meaningful** the intricate processes of complicated legislative machinery. What is more: the doing of problems can encourage the development of skills much in the same manner as they are used in the day-to-day life of the operating lawyer.

The problems that have been selected are by no means exhaustive; they are merely suggestive. Many can be added or deleted to fit more closely the background and purpose of the teacher, the ability and interest of the students, as well as the particular jurisdiction in which the student is likely to practice. As to the danger of succeeding classes availing themselves of “answers” to the problems, no more difficulty should be encountered than with the “answers” to cases. There, too, there are usually no “pat” answers—cases, like problems, being merely springboards for extended classroom discussion.

Just how far one may succeed in developing the necessary skills for the tasks which are considered in this volume; just how much of the material should be used and the order in which it is presented—depend, of course, on a host of variables: the quality of student and teacher, at what period of the students’ training the course in Legislation is offered, how much of the total classroom time is allotted to the subject, and how the course fits into the framework of the curriculum of the particular law school. There obviously are tasks other than those selected here for study which the legislative lawyer is often asked to perform. There are, for example, the jobs of codification and revision, of preparing municipal ordinances and administrative regulations

which, though offshoots of the drafting skill, nevertheless present special problems of their own; there is the preparation of briefs and arguments before legislative committees. Experience, however, has suggested that these can be better dealt with later in seminars or in legislative laboratories where there is better opportunity to develop the skills for these tasks by actually undertaking to perform them. The seminar or laboratory method is, of course, equally desirable for the further development of skills involved in some of the tasks considered in this volume. For even assuming ideal conditions, the most that can be hoped for in an introductory course is an introduction to the tasks, problems and skills. The drafting skill, in particular, can only be sharpened beyond the introductory stage by being exposed to a variety of different situations. And the same is true with respect to those skills which the lawyer must employ when he is called upon to design the legislative means for accomplishing given ends—a task which involves working with people in related fields—with economists, statisticians, sociologists, engineers, and others whose disciplines may be involved in the solution of a particular problem. There would seem to be no better way for the would-be lawyer to understand this relationship than to bring him into actual contact with the specialists in these related fields in a common effort to work out a legislative solution to a given problem.

Grateful acknowledgment is made to Dean Frederick K. Beutel of the College of Law, University of Nebraska, whose encouragement and assistance made this project possible; to William E. Finnegan, Jr., for his valuable assistance in the early stages of the preparation of this volume; to Robert A. Barlow, Jr., who rendered yeoman service in criticising and in gathering and preparing materials for the later and final stages; to Miss Norma Christian, who bore the brunt of the heavy burden of typing, proof reading, and arranging the physical details of the manuscript; to Miss Emily Schossberger, who gave graciously of her valuable time and energy; to my many students who, wittingly or unwittingly, were the “guinea pigs” of this venture; and last, but not least, to my wife, Lillian, for assistance in research, proof reading, indexing and for her general encouragement and all around helpfulness. To the American Bar Association Journal, Appleton-Century-Crofts, Inc., Bureau of National Affairs, Columbia Law Review, Commerce Clearing House, Inc., Harcourt, Brace and Company, Harvard Law Review, The Iowa Law Review, Law and Contemporary Problems, Law Quarterly Review, The National Law Book Co., The New York Times, Oregon Law Review, University of Pennsylvania Law Review, Washington Law Review, Yale Law Review, and the Yale University

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MATERIALS AND PROBLEMS

ON

LEGISLATION

PART I

INTRODUCTION

ON THE STUDY OF LEGISLATION: THE CONTENT AND METHOD OF THE COURSE¹

Of the many examples of the lag between the lawyer's present-day training and the skills he is called upon to employ, there is one which merits special attention—the training lag with respect to the skills needed by the lawyer functioning in the legislative arena. The lawyer's skill as a hired soldier is not limited to the judicial battlefield. He often may find it more expedient to do his fighting on the legislative front. Witness the recent successful attempt of the Association of American Railways, through the Reed-Bulwinkle Act,² to immunize it from judicial attack under the Sherman Anti-Trust Act. Witness further the recent attempt to circumvent the Supreme Court's Associated Press decision³ by legislative action.⁴ More often than not, the lawyer may be called upon to organize support and map the political strategy for an offensive against undesirable legislation; he may be called upon to draft legislation, submit amendments to counter-legislation, or testify or aid his client in testifying before Congressional or state legislative committees. Just as there are techniques and skills to be mas-

¹ This discussion borrows heavily from my article, *On the Teaching of Legislation* (1948) 47 Col. L. Rev. 1301.

² Pub. Law 662, 80th Cong., 2d Sess. (1948). This, in effect, permits competing railroads to act together, free from anti-trust prosecution, as long as the agreements so made have the approval of the Interstate Commerce Commission.

³ 326 U. S. 1, 65 S. Ct. 1416 (1945). The Associated Press decision held that AP by-laws governing the admission of new members violated the Sherman Anti-Trust Act. The by-laws made it possible for a newspaper with AP membership to protect or foster its monopolistic position by blocking a competing newspaper from AP membership.

⁴ See the N. Y. Times Index precis, April 22, 1947, p. 14: "Col. R. R. McCormick Urges Mason Bill Passage So AP Can Choose Own Members."

tered in fighting on the judicial front,—for example, skills of the advocate in utilizing the tools of statutory construction,—so there are skills to be mastered on the legislative front. The successful “legislative lawyer” on this front must, for example, know how to protect his client’s rights before legislative committees; he must have an intimate knowledge of legislative machinery, of the key points at which power may be withheld or channeled to desired ends; he must know the available methods for tapping that power; he must have the creative ingenuity to conceive and the technical skills to design legislative proposals to realize a client’s objective with a minimum of conflict and a maximum of efficiency. Just as he must be equipped, for example, to draw up contracts, leases and deeds, wills, corporate entities, and trust devices to fit complicated human relationships, so he must be able to deal with such relationships in legislative terms, that is, in the form of statutes, ordinances and administrative rules; he must, as in these other fields, be able to predict with reasonable certainty what the legislative proposals will produce. Some of them may have already been in operation, and if their effects are reasonably ascertainable, the margin of error in predicting their probable consequences is, to that extent, reduced. Other situations demand a solution for which no precedent is available—calling for creative ingenuity in devising legislation that not only will withstand constitutional attack, but will assure the realization of the desired end.

In part, then, the course of study is planned to familiarize the would-be lawyer with some of the roles he will be called upon to play while representing clients in connection with legislative interests, some of the problems he might encounter and the skills which will be required to meet them. The first chapter on “Gauging the Efficacy of Proposed Legislation” proposes to raise the crucial means-end problem, i. e., assuming that there is an objective sought by a client, is legislation a desirable way to achieve it? If so, what kind of legislation will best do the job, and why? The chapter on “Drafting” highlights the problems which the lawyer will face in attempting to crystallize the legislative formula into proper legal form and language. The materials on “Influencing Legislative Activity” point up some of the aspects of the lawyer’s role as an adviser in parliamentary legislative strategy, and as a participant in the legitimate aspects of lobbying. On the assumption that “legislation” is not confined to the activities of such bodies as Congress, state legislatures or municipal councils, but includes rule-making by administrative bodies, there is a chapter on “Problems Relating to Administrative Legislation.” The materials on “Investigations under Legislative Authority” are designed to raise and discuss one of the most vexing problems of the day—the

scope and limits of legislative investigatory power—and, not incidentally, to acquaint the student with the role of the lawyer in this phase of legislative-law work. All of these, thus far, deal exclusively with problems, skills, “weapons,” materials, etc., that have become involved in legislative law practice. Two other chapters deal with legislative materials—but for use in the judicial arena. The first of these, “Ascertaining the Meaning of Ambiguous Legislative Language” should aid in sharpening the skills of the advocate, and, at the same time, alert the would-be draftsman to the pitfalls that might befall legislative language when it is dissected by the court. The second, a chapter on “Utilizing Legislative Materials in Judicial Advocacy,” is designed to encourage a better integration of legislative and judicial law.

Wherever feasible, the problem method is employed. Although, in some instances, the problem will require the student to take a particular “side,” the selection of the “side” has been made solely with an eye towards effective pedagogy. The skills sought to be developed are not the property of any “side.” They are available for the lawyer who represents a private person or group, or a government agency; they are available to the lawyer engaged to defend the status quo or to assume the role of architect of social change.

Although some of the areas of inquiry to which these materials point do not follow conventional law school lines, to set up a quarantine around them on the ground that they deal with the “political” and not the “legal” would seem as unreal as to deny medical students access to birth control films on the ground that they are “immoral” and not “scientific.” It loses sight of the fact that, when individuals or groups employ legal talent to achieve certain ends, they often do not put artificial strictures on the type of power which must be harnessed. Indeed, part of the lawyer’s task is to weigh the relative merits of the arena on which the battle may be fought—in terms of time, cost, and effectiveness. Once having made the choice, there is the problem of selecting the most effective and suitable weapons. For example, the American Federation of Labor at one time sought to prevent the National Labor Relations Board from issuing a cease and desist order against a company that had signed a closed shop contract with the American Federation of Labor before the company employees were even hired.⁵ The device used (though now curbed by the recent Legislative Reorganization Act) was the very effective rider to an appropriation bill which, in effect, forbade the Board from questioning the propriety of a labor contract if it

⁵ Hearings before Subcommittee of Committee on Appropriations, H. of Rep., 78th Cong., 1st Sess., pt. 1, 325.

had been in existence for three months, and no charge had been filed with the Board with respect to it during that period.⁶ Other situations may well arise which might call for the mapping of different strategy, e. g., the "pigeon-holing" of an undesirable piece of legislation, a filibuster or other dilatory tactic,⁷ the blocking of an unfavorable appointment.⁸

If it is a legitimate activity of non-legislators to investigate facts relating to, consult and advise about, and present cases for or against proposed or existing legislation, and the lawyer is to be repeatedly called upon for the task, it would seem to be the essence of realism to help him prepare for it.

A word of clarification—A considerable share of these materials are woven around legislation (or proposed legislation) concerned with the adulteration and misbranding of foods, drugs and cosmetics. Without an explanation for this selection at the outset, a student at the early stages of the course might be prone to remark: "My goodness, I thought this was a course in Legislation! What are they trying to do—make a food and drug lawyer out of me?" Certainly not! These food and drug materials were selected merely as a convenient pedagogic device, because of their unusual suitability as a springboard (1) for considering a wide range of typical legislative problems, (2) for developing skills and (3) for imparting to the operating legislative lawyer basic information with regard to the process of legislation generally—no matter what the subject matter of the legislation may be. The processes involved in gauging the efficacy of proposed legislation, in ascertaining the meaning of ambiguous legislative language, and in the drafting of legislation are, in actual practice, so inextricably intertwined that to exemplify them with diverse, unrelated statutory materials would lead to distortion. Thus, the selection of a single broad legislative subject—the misbranding and adulteration of foods, drugs and cosmetics. This will permit a diversity of problems, but they are tied meaningfully together because they radiate from a single theme.

The emphasis throughout the course is on basic skills and knowledge. With basic equipment, a music student can learn to play a variety of musical compositions. And so with the operating legislative lawyer. It is hoped that the "equipment" contained in these materials will enable him to go far beyond the area of food, drugs and cosmetics legislation.

⁶ 13 Labor Relations Manual 2562 (1944).

⁷ A recent example is that of the filibuster of the Fair Employment Practices bill. For an account of the techniques used, see Maslow, *A Case History in Parliamentary Maneuver*, 13 U. of Chi. L. Rev. 407 (1946); and see Julius and Lillian Cohen, *Facing the Filibuster*, *Forum*, August, 1946, 112.

⁸ For an account of the fight on the Lilienthal appointment to the United States Atomic Energy Commission, see the *New York Times*, February 23, 1947, sec. 4, p. 1E.

PART II

THE TASKS AND THE SKILLS

CHAPTER 1

GAUGING THE EFFICACY OF PROPOSED LEGISLATION

A. INTRODUCTORY NOTE

One of the most important tasks of the lawyer is that of gauging the efficacy of proposed legislation, that is, of ascertaining whether legislation—as distinguished from some other method of control—is the proper instrument to achieve a given end; and, if so, of anticipating just what specific legislative proposal is necessary to produce that end. The performance of this task may be required when the lawyer is called upon to evaluate the handiwork of others, or when he undertakes himself the job of designing what is needed to accomplish a given objective; it may be performed in different forms and under different circumstances—by written memorandum to an interested client, or by testimony before a Congressional committee bent on as-saying the merits of proposed legislation. At times, the lawyer in this role is very much like the physician who is asked to pre-scribe a program for the avoidance of certain maladies, or to give his opinion (on consultation) as to the chances of one of his colleague's patients for survival. At other times he is like the surgeon who must perform a quick job on the operating table if the patient's life is to be saved.

Often, the objective sought to be accomplished by legislation is comparatively simple—involving, for example, the patching up of a statute damaged by an adverse judicial decision. Often, however, the objectives are far-reaching—perhaps involving the remedying of defects found in the operation of the common law or the solution of such problems which neither the common law nor the existing statutes encompass. Some of these are, indeed, so far reaching, crossing so many spheres of knowledge, that the lawyer must tap the resources of many specialists outside of “the law” to aid him in making a proper judgment. Take, for example, a legislative proposal for the curbing of juvenile delinquency. The prediction of a court's reaction to such a proposal is a matter which should be within the peculiar provinces of the lawyer, for the court—its personalities, its values, traditions, language, and ways of doing business—has been almost exclus-

ively the object of his law-school study. But the prediction of what such a legislative proposal will probably accomplish is a matter not peculiarly within the lawyer's domain. Rather it is in the domain of those whose forte is in the physical and the social sciences; and to them and their works he must look for assistance. Anyone, for example, who is given the task of drawing up the legislative blue prints for a flood control or accident reduction program—as is often the lawyer's task—cannot afford to shirk the job of assaying the available criteria for determining the relation between the various means which may be employed and the ends sought. Consider also the problem of discrimination in employment. How reduce it—by criminal sanctions, licensing and other administrative controls? By equitable remedies? What is the social and individual cost in terms of financial outlay, in terms of prevailing democratic values? Or to take other examples: how feasible would it be to transplant an English technique for insuring clean wholesome milk—that of requiring an offender to post conspicuous notice of his delinquency on his delivery truck?¹ How reduce fraud at elections—by a system of permanent registration? How best eliminate some of the most flagrant hotel fire hazards? Would, for example, criminal penalties for smoking in hotel beds be feasible?² To answer these and an infinite number of similar questions, it is obvious that in addition to the "law," knowledge of economics, sociology, psychology, public administration, statistics, sanitary engineering—to mention but a few, are necessary, i. e., information from those, who, from specialized experience, are in a better position than the lawyer to judge just how certain aspects of the legislative proposal might work. Although it is, of course, too much to ask the lawyer to be expert in these extra-legal fields, he must, if he is to perform this task properly, at least know if the knowledge is obtainable; if so, where and how to make use of it for an over-all appraisal. In brief, amongst other things, he must be a competent broker of extra-legal information.

But whether the objective calls for individual action, or requires a pooling of knowledge of a team of specialists, the contribution of the lawyer *qua* lawyer to the problem of gauging the efficacy of proposed legislation is usually that of anticipating (1) just what situations and parties the proposal will cover, (2)

¹ See Public Health (London) Act of 1936 No. 190, sub-section 4, cited in Horack, *Cases and Materials on Legislation*, 153 (1940).

² Note the following account of a bill (Nebraska LB 75) designed to accomplish this end: "Terming LB 75 'unenforceable,' Governor Peterson vetoed his first bill Wednesday as he returned to the unicameral * * * (the) measure which provided penalties for persons smoking in or on a hotel, apartment, rooming house or tourist camp bed. 'Unenforceable laws bring all laws into disrepute' asserted the Governor. 'In my judgment it would not be possible to enforce this act and I therefore return LB 75 without my signature.'" *Lincoln Star*, February 26, 1947, p. 1.

how the legal machinery will operate in relation to the objective, and (3) whether there will be sufficient power to operate it. Let us see just how he might be called upon to perform this job in a sample situation.

B. AN ILLUSTRATIVE PROBLEM

PROPOSED FEDERAL LEGISLATION TO PROTECT CONSUMERS FROM THE EVILS OF ADULTERATED AND MISBRANDED FOOD, DRUG AND COSMETIC PRODUCTS

Suppose you are the young attorney who has just been engaged as special legislative counsel by the General Counsel of a federal government agency to aid it in furthering a long-range legislative objective: the attainment of adequate consumer protection against those who endanger the public health by trafficking in adulterated food, drug and cosmetic products, as well as against those who damage the consumer's pocketbook by engaging in deceptive trade practices with respect to these products.

The early background of the problem—social, political and legal

Not being familiar with the specific field of inquiry, you decide to roll up your sleeves and obtain some early background information on the whole problem. Many questions come to mind. How long has the struggle over food and drug legislation been going on in this country? Who and what was involved in the struggle? Why has the federal government been interested in the problem? Why was federal legislation needed? Why couldn't adequate protection be given the consumer under state laws? Did the state machinery of control break down? If so, at what point? Anticipating these problems in your mind, the General Counsel suggests that you might start getting your feet on the ground by reading the following article:

C. C. REGIER, THE STRUGGLE FOR FEDERAL FOOD AND DRUGS LEGISLATION³

1 Law and Contemporary Problems 3-15 (1933)⁴

* * *

The first step in the struggle to guarantee pure food and drugs by law was taken in 1850. In that year a federal statute was passed which provided for the classification of tea and for the exclusion of certain kinds. Between January 20, 1879, and June 30, 1906, when the Food and Drugs Act was passed, 190

³ The footnotes have been omitted.

⁴ Reprinted by permission from Law and Contemporary Problems, published by the Duke University School of Law, Durham, North Carolina. Copyright 1933 (1939), by the Duke University Press.

measures were presented in Congress which were designed in some way to protect the consumer of food and drugs. "Of these, eight became law, six passed the House but not the Senate, three passed the Senate but not the House, twenty-three were reported favorably from the committee to which they had been referred, nine were reported back adversely, and 141 were never heard of after their introduction."

Professor Thomas A. Bailey, in an illuminative article on "Congressional Opposition to Pure Food Legislation, 1879-1906," claims that it was understood from the beginning that a sweeping pure-food law could not be obtained all at once; that the movement was a gradual evolution from specific laws on definite articles, such as those on glucose, cheese, meat, lard, butter, oleomargarine, baking powder, tea, drugs, canned fish, to the general law of 1906; and that "it was comparatively easy to pass a measure governing the importation of foreign goods, less easy to regulate exported goods, less easy to improve food conditions in the District of Columbia, and exceedingly difficult to prohibit adulterated foods in interstate commerce."

At first there was very little interest in this sort of legislation. It was regarded as the work of cranks and reformers. In 1884 a resolution was introduced in the House authorizing an investigation of adulterated food and drugs by the Committee on Public Health, but it received only fourteen favorable votes. Two years later a tax was placed on oleomargarine, to which the South was almost solidly opposed, for cotton-seed oil went into the manufacture of this product. Between 1887 and 1892 hundreds of petitions were sent to Congress protesting against the manufacture of compound lard. This precipitated a contest between the cotton-seed oil producing states and the hog raising states. Congress would not act, and so the agitation collapsed. In 1890 a law was passed which provided for the inspection of meat for export and for the prohibition of importation of adulterated food and drinks. This was largely caused by the refusal on the part of Germany and France to receive diseased meat from this country. In the 51st Congress (1889-91) Senator Paddock of Nebraska sponsored the first general pure food bill. He tried, vainly, on four separate occasions to secure action on the bill. Always there were appropriation bills in the way. In the next Congress he succeeded in inducing the Senate to pass such a bill, only to have the House give it a lingering death.

There seemed to be an understanding between the two houses that when one passed a bill to repress food adulteration the other would see to it that it was buried. In the later stages of the struggle, when it had become dangerous to oppose such measures openly, the proponents of pure food bills encountered great difficulty in getting the bills called up at all. Excuses were al-

ways found. Among the most common were: more pressing legislation, agreement in principle but opposition to construction, the desirability of letting the states handle their own problems in their own way, and the prevention of hasty legislation.

The opposition to pure food legislation came chiefly from three classes. First, there were those who objected on constitutional grounds. They did not wish to have the federal government extend its police power into the states. This opposition came largely from southern Democrats. Secondly, there were many who did not realize the seriousness of the problem. And finally, there were some who were personally interested in the perpetuation of frauds that would be illegal under a pure food statute. The objection from the first two groups almost disappeared as the issue became clearer and public opinion more insistent, but the third class fought to the bitter end, although mostly under cover. Many of the congressmen feared to oppose the powerful business interests, for on big business most of the Republican senators and House members and practically all the more powerful ones, depended for re-election.

* * *

Before Congress could be induced to act, it was necessary for public opinion to assert itself more vigorously, and that finally came about in no uncertain terms. As in many other matters, the legislation in favor of pure food was the result of a long process of education and agitation.

The resentment began with the farmers. They objected to the adulteration of milk, butter, lard, and other food products. They established state departments of agriculture, and provided themselves with state chemists whose duty was to analyse foods in order to detect imitations and adulterations. This led to an interest in the whole problem of sanitation and to food legislation. By 1906 practically all the states had pure food laws. In 1898 the National Association of State Dairy and Food Departments was organized, and this association held annual meetings. It was soon apparent that only a national law would be adequate. The states, acting separately, could not protect themselves against interstate commerce, and by establishing different standards, they made it very difficult for the manufacturer to meet them all. The more reputable manufacturers of food products were not slow to appreciate that a federal law would be to their interest, but, as long as their competitors were allowed to imitate the goods of others and to adulterate and misbrand their own, they found themselves in a difficult position.

In the long crusade for pure food and drugs, the outstanding figure was Dr. Harvey W. Wiley. He was "a very mountain among men, a lion among fighters." At the same time he was a

"keen student of human nature" and a "prince of good fellows." Not only was he an efficient scientist and investigator but also an effective writer and speaker. After a short but brilliant career as a chemist in Indiana, particularly at Purdue University, he was appointed Chief Chemist in the Department of Agriculture. This position he held from 1883 to 1912. When Congress created the Bureau of Chemistry in the Department of Agriculture, he was made the chief of the new bureau.

When he entered upon his government duties he found much work to be done. After years of unrelenting activity in behalf of unadulterated food, he published his Bulletin No. 13, Bureau of Chemistry. This covered practically all classes of human food, and did much to create interest in the subject. Other reports, books, and articles followed from his prolific pen. In 1902 he organized what came to be known as "Doctor Wiley's poison squad." This was an attempt to test the effect of commonly used food preservatives on the health of certain young men of the Department of Agriculture. These experiments were carried on for five years and proved conclusively that such preservatives are harmful to health. The press carried the reports of these investigations all over the world.

That his official position was not free from anxiety and interference may be inferred from what he says about the man who was his superior for fifteen years, Secretary of Agriculture James Wilson (1897-1913). Mr. Wilson, he wrote in later years, "had the greatest capacity of any person I ever knew to take the wrong side of public questions, especially those relating to health through diet." It was fortunate for Wiley, however, that he had good friends on the House Committee on Agriculture. These saw to it that the appropriations for the Bureau of Chemistry were not cut off.

About the time when Wiley organized his poison squad, the so-called muckrakers appeared upon the scene. They ruthlessly exposed a great variety of corruption and fraud, including all those interests which opposed the passage of a pure food and drugs act. Among these may be mentioned all those who were preserving foods by means of chemicals; the manufacturers of articles which were used in the adulteration of food and drugs; the "rectifiers," or producers of fraudulent whiskey out of alcohol, colors, and flavors; the patent-medicine manufacturers; and the dishonest misbranders and mislabelers of food and drug products. Long before the era of the muckrakers had come to a close, the Food and Drugs Act of 1906 was safely on the statute books.

The Ladies Home Journal and Collier's Weekly waged a determined campaign against the patent medicine fraud. Edward Bok and Mark Sullivan wrote for the former, and Samuel Hop-

kins Adams for the latter. Adams was easily the outstanding muckraker in this field. In 1905 and 1906 he wrote twelve articles under the general title "The Great American Fraud." Of these seven appeared before the act of 1906 was passed. He compared the chemical analyses with the curative claims of scores of patent medicines. Many of these contained alcohol, opium, or cocaine as the chief element. "Liquozone," he claimed was composed of nine-tenths of a per cent of sulphuric acid, three-tenths of a per cent of sulphurous acid, and nearly ninety-nine per cent of water. And this was advertised to cure thirty-seven varieties of diseases. "Peruna" contained twenty-eight per cent of alcohol and often led to tuberculosis and drunkenness. It cost eight and a half cents to produce and sold for a dollar.

Years later he described the conditions which prevailed before the passage of the act of 1906 in these words: "Floods of potions, avalanches of pills and powders, had been pouring out from the various nostrum shops, without let or hindrance, to overflow the land. Seventy-five million dollars a year is a moderate estimate of the volume of business done by pseudo-medical preparations which 'eradicated' asthma with sugar and water, 'soothed' babies with concealed and deadly opiates, 'relieved' headaches through the agency of dangerous, heart-impairing, coal-tar drugs, 'dispelled' catarrh by cocaine mixture, enticing to a habit worse than death's very self, and 'cured' tuberculosis, cancer, and Bright's disease with disguised and flavored whiskies and gins."

The patent medicine interests were organized under the name "The Proprietary Association of America." It wielded a tremendous influence over the press through its advertisements. Wiley estimated that the newspapers and periodicals received \$100,000,000 a year from advertising patent medicines. Collier's exposed their methods of muzzling the press. In order to prevent adverse legislation, President F. J. Cheney of the Association inserted in his advertising contracts with some 15,000 newspapers this clause: "It is mutually agreed that this contract is void if any law is passed in your state prohibiting the manufacture or sale of proprietary medicines." Others made the contracts even stronger. Few publishers would jeopardize their income from this source.

Scores of articles appeared in 1905 and 1906 which dealt with the patent medicine evil and the adulteration of food. Even Senator McCumber of North Dakota had an article in the Independent which was entitled "The Alarming Adulteration of Food and Drugs." In it he presented many facts which Professor E. F. Ladd, the Food Commissioner of his own state, had discovered. Ladd had never yet found a can of potted chicken or potted turkey in North Dakota which con-

tained chicken or turkey in determinable quantities. Of the local markets of this state, ninety per cent used chemical preservatives. The amount of borax or boracic acid which was used in sausages and hamburger steak ranged from twenty to forty-five grains per pound though the daily medical dose was only from five to nine grains. Nearly every imported ham contained borax. Boracic acid or borates were common ingredients of dried beef, smoked meats, canned bacon, and canned chipped beef. Ninety per cent of the so-called French peas were found to contain copper salts, and some contained aluminum salts in addition. Only one kind of catsup was free from chemical preservatives and coal tar coloring matters. About seventy per cent of cocoas and chocolates were adulterated, and glucose served a great variety of purposes. More than ten times the amount of Vermont maple syrup was sold every year than that state could produce. A large proportion of ground spices were imitations. Jellies, wines, and other liquors were made from cheap substances and then doctored up. Butter was a mixture of butter and neutral lard. Cider vinegar usually contained no apple juice. Drugs were adulterated and misbranded in a similar fashion, often with deplorable consequences.

Walter Lippman claimed that a vivid description of food conditions would reveal revolting conditions, "Milk would curdle the blood, bread and butter would raise a scandal, candy—the volume would have to be suppressed." Jelly, stated another writer, was made out of apple cores, apple parings, and cheap apples. It was put into a large tank. As orders were received for various kinds of jellies, they were all filled from this same tank. Color and flavor were added as the demand required. The same practice was followed by the liquor dealers, as was revealed in the congressional debates.

The meat industry, too, was under attack. Beginning with February, 1905, Charles Edward Russell ran eight articles in Everybody's under the imposing title "The Greatest Trust in the World." He began the series with this statement: "In the free republic of the United States of America is a power greater than the government, greater than the courts or judges, greater than legislatures, superior to and independent of all authority of state and nation." No king or emperor or irresponsible oligarch, he went on to say, had ever wielded such power. It existed and proceeded in defiance of law. It, the Beef Trust, like the Standard Oil Trust, rested solely and squarely upon railroad rebates. These rebates had been received from all the railroads in spite of the Interstate Commerce Act. For 1905, Mr. Russell estimated, these rebates would probably amount to \$25,000,000. Although the rebates were in this case called

"private car charges" the effects were the same. Through perfection of organization this trust had managed to increase the retail prices of meat in spite of the fact that the value of beef cattle in the United States had declined by \$163,000,000 in the three years ending January 1, 1905.

Collier's Weekly also participated in this controversy. It commented on the damaging charges against the Chicago slaughter-houses which the English periodical, *Lancet*, made early in the same year. The *Lancet* articles were also an indictment of the government meat inspection service. And the denial of the charges on the part of the packers afforded Upton Sinclair an opportunity to write some scathing articles on the subject.

The most sensational piece of literature concerning this matter, however, was not so much the product of typical muckraking as of fictional propaganda. After having spent seven weeks in "Packingtown" where he talked with workingmen, bosses, superintendents, night-watchmen, saloon-keepers, politicians, clergymen, and settlement-workers, Upton Sinclair wrote his famous novel, *The Jungle*. In it he told of the tragedies which befell a Lithuanian peasant while working in the Chicago meat-packing establishments. The book was meant to be propaganda for socialism, but what the public noted most were the bits of information which it gave about the unsanitary conditions which prevailed in the packing houses and the unclean meat that was sold to the public. Sinclair described how diseased cattle were butchered, marked by the government inspectors, thrown into dumps, loaded on carts and wheeled back again and mingled with other carcasses and treated and sold as clean meat. Animals that had died on the trains in transit were unloaded in the stockyards at night and treated as pure meat. Some of the descriptions of the filth and dirt that prevailed in the packing houses were utterly revolting. It is no wonder that many people lost temporarily their appetite for meat. The author said later he aimed at the public's heart and by accident hit it in the stomach. *The Jungle* was the best selling book for a year in the United States, Great Britain and her colonies. It was translated into seventeen languages, and by 1922 about 150,000 copies of it had been sold.

The women, too, had a share in this campaign of education and agitation. The General Federation of Women's Clubs organized a Pure Food Committee in 1904. This committee wrote some two thousand letters, sent circulars to every state, and tried by letters, talks, exhibits, and literature to arouse interest in the subject. It memorialized the President, the Secretary of Agriculture, the Senate and the House of Representatives, and kept up a newspaper warfare. It has been said that

the women did more in this crusade without votes than they have done since 1919 with votes.

After all this clamor—or rather, while the clamor was going on—Congress could no longer dispose of this matter by mere obstruction. In his message of December 5, 1905, President Roosevelt briefly but forcefully called for legislation on the subject of misbranding and adulterating foods, drinks and drugs. In the same month Senator Heyburn re-introduced his bill, Senate bill No. 88, “for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicine, and liquors, and for regulating traffic therein, and for other purposes.”

On January 10, 1906, he got the bill up for consideration. In his speech he pointed out the new features of this bill. In the first place, it held the officers of a corporation personally responsible for offenses, and in the second place, it separated liquors from food. Heyburn then proceeded to discuss the difficulty in which the states found themselves. “There are a number of fraudulent articles that are under the ban of this legislation, not a pound or ounce of which is offered for sale in the state in which it is manufactured, because they are provided against by the legislation of that state; but they are manufactured in one state and sent to another in unbroken packages under the rule of law that is now established, perhaps forever. So that the state into which they are sent is helpless against a flood of these impure articles sent in unbroken packages under the protection of that rule of law and then offered for sale upon the retail market.” In some states, he went on to say, sixty per cent of the drugs were adulterated, and Congress must meet the states half way. Heyburn later (February 21) had a resolution and a report read from the American Medical Association which endorsed the Heyburn bill. It claimed to represent the conviction of 135,000 physicians in 2,000 counties.

McCumber said the public and the press demanded action. “A great number of the leading magazines” were devoting considerable attention to the contents of this bill, and all the honest manufacturers were for it. He, then, proceeded to explain from what sources the opposition came. The whiskey blenders, who were organized in the National Association of Liquor Dealers, had boasted that they alone had prevented the Senate from acting on this bill in the last two Congresses. Then there were the wine merchants and those merchants who sold cotton-seed oil for French olive oil. Besides these, there were some manufacturers of jellies. These were practically the only opponents of the bill, he said. But he should have included the patent medicine fraternity. This he later did, and stated that it was perhaps true that ninety-five per cent of patent medicines were frauds

and that ninety-five per cent of the drugs sold were patent medicines or proprietary medicines. The annual value of adulterated food, he estimated at three billion dollars.

Senator Aldrich, the Republican leader in the Senate and an old enemy of pure food legislation, found himself obliged to fight in the open this time, a thing he rarely did. Early in the debate he made a one-minute speech in which he tried to make the measure seem ridiculous by raising the question as to whether the time had come when Congress should prescribe for the people of the United States what they should eat and drink. To this McCumber replied, in effect, that the contrary was the truth, that this bill was intended to make it possible for everybody to buy the kind of food he wanted to eat.

Senator Money of Mississippi offered a substitute for S. 88. His bill had been drafted by the secretary of the National Food Manufacturers' Association and had the approval of three hundred food manufacturers. McCumber pointed out that the substitute bill would interfere with state pure-food laws, would be very difficult of enforcement, gave the manufacturers undue protection and advantages, and did not cover the patent medicines.

The two Senators who bore the brunt of the fight for the bill were Heyburn, who was in charge, and McCumber. Among those who raised objections were Aldrich, Money, Bailey, Foraker, Spooner, Gallinger, Hemenway, Lodge, and Penrose. The vote in the Senate was taken on February 21, 1906, and passed by 63 to 4, not voting 22. The four voting against the bill were Bacon of Georgia, Bailey of Texas, Foster of Louisiana, and Tillman of South Carolina. All four objected to the bill on constitutional grounds. Bailey insisted that the bill was "purely and only an exercise of the police power, and therefore not within the power of the federal government."

Four months elapsed before the House of Representatives gave the bill its serious attention. Then it gave parts of three days—June 21, 22, 23—to its discussion. Hepburn of Iowa was in charge of the bill, but Mann of Illinois opened the debate. He stated that the delay had been due to appropriation bills, and that the leaders of the House had constantly assured the proponents of pure food legislation that this measure would be taken up. He said that after S. 88 had been referred to the House Committee on Interstate and Foreign Commerce, this committee struck out everything after the enacting clause and substituted for it the House bill. He explained the differences between the two bills, which were not important, except that the House bill provided for the fixing of food standards and that it had a provision on narcotics, which S. 88 did not have. He showed that many people had been misinformed as to the difference

between the two bills. They had been led to believe that it was the Senate bill which dealt with narcotics, and so they demanded that the Senate bill be passed. He intimated that it was the Proprietary Association which had inspired this impression.

A long minority report was submitted by members of the committee. . . . The whole contention of the minority report was that the federal government had no right to extend its police powers into the states. This was also the import of the speech which Adamson, as leader of the opposition, made on this occasion. "The truth about it is," he claimed, "the bill from first to last, violates every principle of our government by proposing to go into sumptuary legislation for the regulation of the table menu, and I suppose the next step will be to prescribe the table etiquette and dress." Applause greeted him when he said, "I believe there are millions of old women, white and black, all over my country, who know more about victuals and good eating than my friend Doctor Wiley and all of his apothecary shop."

After a lively, though not acrimonious, debate in which there were frequent allusions to Wiley, Adams, and the excitement of the public, the House passed its own bill with a vote of 241 against 17. In the ensuing conference committee Heyburn, McCumber, and Latimer represented the Senate, and Hepburn, Mann, and Ryan, the House. All the important features of the Senate bill were retained, and the provision on narcotics was added. The House clause for the creation of food standards was eliminated. In this form both houses agreed to the conference report on June 29, 1906. The next day it received the President's signature.

Before the House took up the consideration of the Hepburn bill, the Senate had started another important food measure.

For some time the meat industry had been under attack. In February, 1906, *The Jungle* was published. Senator Beveridge of Indiana read it in March and called it to the attention of Roosevelt, not knowing that the latter had seen it in manuscript. Roosevelt was especially impressed with the reflections it cast on the government inspection service. He called Secretary Wilson's attention to it, who sent three men from the Department of Agriculture to Chicago to make an investigation. Conscious of the public excitement that had been aroused and fearing that the investigation by the agricultural department would result in a "whitewashing" report, Roosevelt sent a commission of his own to bring in a report. His investigators were James Bronson Reynolds, a reformer, and Charles P. Neill, a United States labor commissioner.

Unconscious of this investigation, Beveridge informed the

President that he was drafting a meat inspection bill. The latter advised him to wait until Reynolds and Neill came back. On their return he consulted with them and continued working on his bill, drafting it about twenty times and sending every third or fourth draft to Wilson for comment. On May 25 he offered it as an amendment to the Agricultural Appropriation Bill, and it was adopted without debate or reference.

The amendment provided that the Secretary of Agriculture should cause postmortem examinations to be made of slaughtered cattle, sheep, swine, and goats; food products should be inspected; slaughtering and canning establishments should be kept in a sanitary condition; animals should be inspected before slaughtering; canned meat should bear the date of inspection on the label; inspections should be made also during the night; a fee should be charged for this service; animals for export should be inspected; labels on canned goods must not be falsified; but the act should not apply to farmers who might engage in local commerce.

The packers became frantic and tried to hush things up quickly. They inspired more than a thousand telegrams to Roosevelt, protesting against the publication of the Neill-Reynolds report; they induced the live-stock raisers of the country to support them; and they tried to intimidate the President and his commissioners. At the same time they began a feverish clean-up of the packing houses.

When the bill came to the House, it was referred to the Committee on Agriculture. Here efforts were made to emasculate the meat inspection amendment. Chairman James W. Wadsworth of the committee was friendly to the packers, and in the hearings which he conducted he seemed to favor the meat industry. But Roosevelt was determined that the teeth should not be pulled out of the bill. He had received the Neill-Reynolds report on June 2, and two days later he sent an urgent message to the House, advocating the acceptance of the Beveridge amendment, and at the same time he sent the first part of the much-feared report, which was immediately broadcast by the press. This compelled favorable action on the part of the committee. When the bill was reported to the House on June 19 the teeth had all been restored except two. It did not provide for the date on the label, but it did provide that \$3,000,000 be permanently appropriated for meat inspection, thus relieving the meat industry of that expense. In that form the bill was passed by a large vote, although not without severe criticism.

By this time the packers had changed their attitude. Thomas E. Wilson, one of the large Chicago packers, testified before the committee that the sale of meat and meat products had been more than cut in two, and another packer stated that every country in

Europe had taken up the agitation and that it was hurting American business. They began to realize that government inspection was the only thing that could save their business; for that alone could restore the confidence of the public; so they faced about and supported inspection. But they did not want to bear the cost of inspection, nor did they want the date on the label.

When the House message came before the Senate on June 20, it provoked both disappointment and satisfaction. Beveridge claimed the House Bill was a much better one than any informed man had any right to expect during that session. Lodge used strong language on this occasion. He said "those packers in Chicago and those owners of the Standard Oil have done more to advance socialism and anarchism and unrest and agitation than all the socialistic agitators who stand today between the oceans." He wanted "that group of men" to be put on a level with other Americans. McCumber felt sure that the packers would shift the inspection fee to somebody else, because it was absolutely within their power to determine what they should pay for the live-stock and what they should charge the consumer of the meat. . . .

Most of the Senators who expressed themselves urged their conferees to insist on the two points in question. On June 23 the conferees were appointed and consisted of Proctor of Vermont, Hansbrough of North Dakota, and Simmons of North Carolina. The House conferees were Wadsworth of New York, Scott of Kansas, and Lamb of Virginia.

Four days later Proctor reported to the Senate that the House conferees positively refused to compromise on the matter of paying for meat inspection. The Senate conferees had proposed a compromise to the effect that the packers should pay into the treasury five cents per head for cattle and three cents for every hog, sheep, and goat that was inspected. (This, it was estimated, would pay about half the actual expense.) But this suggestion had not been accepted. The other controversial point had not been touched upon.

The next day Proctor submitted the conference report on the Agricultural Appropriation Bill. Everything had been agreed upon except the points relating to meat inspection. The Senators urged their conferees not to jeopardize the whole bill on account of those two points, especially since they were not of fundamental importance.

On the same day the question was taken up in the House. Wadsworth moved that the House conferees should not recede from their position. This provoked a lively debate. Over and over it was stated (in both houses) that the packers had brought about the unsanitary conditions in the meat industry and that they should pay for correcting them. Humphrey of

Washington delivered himself of the following philippic: "The most loathsome and slimy criminal that curses the earth is the one that adulterates food." He is a "fiendish monster." "If I could call from the 'lowest depths of hell words so hot that I could construct out of them sentences that would writhe and hiss like the fanged and poisonous serpent,' I could not express my horror, my loathing, and my hate for those merciless fiends who, for the dollar, traffic in human health and human life, who poison and destroy and murder the helpless and unsuspecting victims that they have already robbed. . . . Honesty and decency stand stupified before the effrontery of the demands of these criminals—that the people pay the cost of the inspection. What is their proposition? That the people shall pay to have them stop their filthy and dangerous practices; that the people shall pay to compel them to obey the law; that the people shall pay to stop them from defrauding and robbing the public; that the people shall pay to prevent them from destroying life and spreading disease; that the people shall pay to stop them from poisoning and murdering the innocent and helpless! A proposition more monstrous never came from the polluted lips of crime." Nevertheless, the motion carried by a vote of 193 to 45.

On June 29 the Senate gave way and the conference report was adopted by both houses. In the Senate there was considerable bitterness. Proctor said he had never seen "such open and barefaced use" of the method of trying to influence Congress by flooding it with telegrams from all over the West, in identical language, "all evidently emanating from Chicago." Nelson claimed that three things had been sought: (1) to placate the packers; (2) to placate the range-cattle men; (3) to get a good market for packers abroad. "I feel," he said, "as though when I go home I will go home like a licked dog, whipped by the packers and by the raisers of range cattle, and nobody else." McCumber thought the whole great conflict could be epitomized in a few words: "We have met the enemy and we are theirs—indemnity, \$3,000,000."

On the same day that the pure food and drugs bill was signed, June 30, 1906, the agricultural appropriation bill, of which the meat inspection rider was a part, received the presidential signature. The former went into effect on January 1, 1907, the latter on July 1, 1906; and a struggle which for many years had been waged in the legislative arena was transferred to the field of administrative action.

Excerpts from Congressional Debate on S. 88

As valuable as Regier's article was to you for purposes of orientation, it did not sufficiently highlight the reasons why federal legislation was needed in 1906—why the states were not properly

equipped to give adequate protection to the consumer. You therefore decide to venture on your own into the recesses of legislative history to find the answers. Assume that your research yields the following illuminating comments made during the course of debate on S. 88 (56th Cong. 1st Sess.)—the bill which ultimately became the 1906 Food and Drug Act.

“Mr. McCUMBER. There are certain principal objects of this bill that ought to be considered generally. The first object is to supplement the efforts of the States. Nearly every State in the Union already has a pure-food law or a code pertaining to the introduction of pure food. The food commissioners of the several States have been busily engaged in attempting to eradicate the evil of impure food, but they are met. . . . at every point by the rules of interstate commerce and are brought face to face with a condition over which the State itself has no control. This bill is intended to supplement the laws of the several States so that they may reach the entire subject.

The next object is to reach the root of the evil itself—the manufacturer. The moment that we strike at the manufacturer of unwholesome, unfit, adulterated, or misbranded articles of food, we have reached the evil in such a way that we may be able to control it. As I have stated, inasmuch as about 95 per cent of all of the impure and improper foods are consumed in States other than those in which they are manufactured, it is quite necessary that the authority having control over interstate commerce should be the authority that should deal with the subject of the manufacture of those products for the purpose of transmitting them into other States.

Another reason is to protect the honest manufacturer and dealer. Every honest manufacturer in the United States is pleading for this bill, because he says that if he manufactures his goods in accordance with the pure-food laws of the several States or Territories, it is impossible for him to compete justly and fairly with the bogus articles that are put in competition with those manufactured by him. No elaborate discussion of that feature of the case is needed.

Another object is to prevent the evil of diverse rulings of the several commissioners of the States having pure-food laws. For instance, there is a manufacturer using certain dyes in order to make his goods appear more presentable. There is a rule in Iowa which requires certain statements to be made and to appear on the can; in another State they are made in another way; while in other States they have no rule upon the subject. Even those States that have similar rules or laws will, through their food commissioners, give dissimilar constructions. One of the objects of this bill is to assist the honest dealer in this character of goods to meet the requirements of the States.

We well know, * * * that the moment we do pass a general law upon this subject, by virtue of that law covering ninety-odd per cent of all of the commerce in impure products, that law must become the dominant law; and, if there is any difference, the State laws will soon accommodate and modify themselves in conformity with the national legislation.”[■]

“MR. McCUMBER. Now, let me give an illustration of why we need national legislation. To do that I borrow from a statement made by one of the pure-food commissioners, or, rather, the secretary of the State of Kentucky. He states that in March, 1901, while standing in front of a grocery store in Morgansville, Ky., a woman and her little child came in with a basket and purchased a number of articles of food for their table, consisting of lard, of sirup, of jelly, of sausages. The price amounted to \$1.80. She gave the grocer all she had—\$1.57—and went away indebted to him 23 cents. Mr. Allen immediately purchased a quantity of each of those articles and analyzed them. He found the sirup was 70 per cent glucose, that the jelly contained nearly everything but fruit juice and was colored with coal-tar dye, the sausage contained an antiseptic, and the lard consisted of beef stearin and cotton-seed oil mixed. Had she gone into the market and bought those articles for what they were, at the very highest retail prices they would not have cost her over 90 cents, and she would have gone away with 67 cents in her pocket, instead of being indebted to the grocer 23 cents; and this, * * * independent of the fraud that was perpetrated upon her, independent of the coal-tar dyes, which her children were compelled unconsciously to consume.

I know our opponents say, ‘You have got pure-food laws in about two-thirds of the States and you have got commissioners to enforce them; why, then, do they not exterminate these evils?’ That can be easily explained by taking the very case which has been mentioned. The lard which was purchased from the retailer in Kentucky was manufactured in St. Louis, the jelly was manufactured in Indiana, the sirup was manufactured in Ohio, the sausage was manufactured in Chicago. Every one of these articles was manufactured in a State outside of the State of their consumption. So, if you got after any man in the State of Kentucky, you would get after the innocent retailer. So it is the manufacturer that must be reached.

I have already explained that in the construction of the interstate-commerce law it has been declared that the term ‘commerce’ not only covers an article in its transit from one State to another, but it protects and shields that article until

it is sold in original packages in the State of its consumption; and then if you can find it you can punish the innocent retail dealer for selling it, even if he was innocent of knowledge of its impurity.

It will be seen, therefore, * * * that the root of the evil is planted in that territory over which the State has no control and over which Congress has complete control—that is, the jurisdiction over interstate commerce.⁶

* * *

“Mr. BAILEY. The Senator * * * knows that the Supreme Court has said more than once that every State in this Union has the inherent, original, and ample power to protect its people against deceptions in trade and against injurious articles of food.

We now and then hear some Senator suggest that the States can not protect their people against the sale of those injurious articles in the original package. * * *

* * * that arises from the fact that the Senator does not distinguish between the decision of the court in the liquor cases and the decision of the court in the food cases.

In the Plumley case the Supreme Court of Massachusetts sustained the conviction of a man who had sold oleomargarine manufactured in Illinois and shipped to the State of Massachusetts, where it was sold in the original package. The agent who sold it was indicted under the laws of Massachusetts, convicted in the lower court, and appealed to the Supreme Court of that State, where the conviction was affirmed. The case was then brought to the Supreme Court of the United States to test the constitutionality of the Massachusetts statute. The Supreme Court of the United States affirmed the judgment of the court below, and held that it was competent for any State in this Union to pass a law prohibiting the sale in the original package of any article injurious to the health of its citizens.⁷”

* * *

“Mr. McCUMBER. * * * the police power of the State can take oleomargarine that is colored as yellow butter and sold for

⁶ 40 Cong. Rec. 1416 (1906).

⁷ 40 Cong. Rec. 2758 (1906). [Ed.] Three decisions rendered before the passage of the 1906 Act—*Plumley v. Massachusetts*, 155 U. S. 461 (1894); *Crossman v. Surman*, 192 U. S. 189 (1904); *Arbuckle Bros. v. Blackburn*, 113 F. 616 (C. C. A. 6th, 1902)—asserted the rights of the state to prohibit the sale and traffic in adulterated and misbranded food and drugs even in the original packages. These decisions were based upon the then recognized principle that, in the absence of federal assertion of power over the subject matter in interstate commerce, effect would be given to the legitimate exercise of the police powers of the states, even though interstate commerce was affected. But whatever power the states had at this time, such power could not be invoked directly against the out-of-state manufacturer who was the source of the evil.

yellow butter. It does not need to wait until the original package is broken, because it is designed as a fraud upon the public, and therefore the police power can reach it.

But let us see what the Senator will do, * * * with his district attorney. I will take a State like the State of Ohio, with its hundreds of thousands of freight trains passing through and across it from all sections of the country, every freight train loaded with box after box, with nothing but the name of the consignee upon a box.

This package is dropped off at this city, this package is dropped off at the next station, and 10,000 aye, 100,000 of those packages are dropped off daily and scattered all over the State. They do not show upon the face of them that they are frauds. I admit the State can get hold of them after they have arrived there, but it may be that two-thirds of them, or 90 per cent of them, are fraudulent goods imported from one State to another State. If the Senator had all the State attorneys and every county attorney busy in the State of Ohio, he could not reach 1 per cent of the entire amount of frauds that could be uncovered in a single day in that State.

Thus we desire, * * * to supplement the power of the State. All of the States have their pure-food laws. All of them say 'we do not want these articles'; but under the interstate commerce—the commerce from all over the country—these articles are dropping in and scattering over our State, so that an army of State officials could not in any possible way meet them.

Now, how do we supplement it? We come right back to the manufacturer. We say to the manufacturer: 'You can not import those goods into a State.' That is a power that we have got. We can say to every manufacturer and to every railroad: 'You shall not take any fraudulent product into any State,' the same as we can say to the authorities the Senator has spoken of in reference to the Post-Office that no fraudulent tickets shall pass from one State to the other.

* * * The Senator would limit this authority to allowing every State to seize the article after it has been scattered daily over 10,000 cities or stations within the State. I can not conceive for one single moment that it is against the power of Congress to so regulate interstate commerce between the States that the very object shall be the protection of the people of that particular State.⁸

The experiences under the 1906 Federal Food and Drug Act in the pursuit of the objective

After briefing you on the early background of the problem,

¹ 40 Cong. Rec. 2761 (1906).

and on the history of the fight to achieve the given objective up to the passage of the 1906 Act, you are directed to the voluminous materials revealing the experiences under the 1906 Act in the attainment of the objective. These consisted, in the main, of the official reports of the Food and Drug Administration, and testimony of government officials, physicians, scientists, food experts, consumer representatives, business, industry and other interested groups, as recorded in the Congressional hearings which antedated the passage of the Federal Food, Drug and Cosmetic Act of 1938. Careful analysis of these materials revealed that the objective, though advanced by the passage of the 1906 Act, fell far short of realization, because of three basic shortcomings in its structure: (a) shortcomings in scope and coverage, attributable either to the inability to foresee the possible evils that needed curbing, or to the lack of power to control the evils that were foreseen, (b) shortcomings in the control machinery, due to the fact that much of it became too outmoded, too heavy and cumbersome to cope with the ingenuity and aggressiveness of modern business and industry, and (c) shortcomings in the language structure, precipitating conflicts in the judicial arena over the "intent" of the Act, which often yielded restrictive "interpretations."

Assignment No. 1. Gauging the Comparative Efficacy of S. 1944, S. 5 and S. 1077 in Proposing to Remedy the Weaknesses of the 1906 Act

Some of the shortcomings of the 1906 Act were dealt with in patchwork fashion by tacking on amendments, piecemeal, to the original structure. But it was pointed out to you that it was the view of the agency that a major overhauling of the structure was necessary if the government was to move closer to its objective; that many legislative proposals and counter-proposals were made by government and industry; and that two competing ones finally emerged—(1) S. 1944, and (2) a combination of two bills which, for purposes of convenience, we shall call S. 5 and S. 1077 respectively. (S. 1944 is set forth in the Supplement, on pages 7 to 22, S. 5 became the Federal Food, Drug and Cosmetic Act of 1938, and is reproduced as such on pages 22 to 47 of the Supplement, and S. 1077, became the Wheeler-Lea Act, which is set forth in the Supplement on pages 47 to 54.)

Assume that the General Counsel is seeking information to determine the comparative merits of these proposals before he makes up his mind which, if any, of the competing ones he will urge the Administrator of the Agency to support. He, accordingly, sends you a memorandum requesting you (1. to make a carefully detailed comparative evaluation of how, if at all, S. 1944 and the combination of S. 5 and S. 1077 propose to

deal with certain listed weaknesses (enumerated below), which the Administrator found in the operation of the 1906 Act; (2. to determine whether any of these proposals for remedying these weaknesses would be vulnerable to attack either in whole or in part, by the absence of constitutional power; and (3. whether the proposals, in the light of the given objective, could be improved upon; and if so, why and how. Assume, further, (a) that S. 1944, S. 5 and S. 1077 would, if enacted, be properly administered and (b) that all of these proposals are yet in the speculative stage, with no hindsight of experience either under the 1938 Act or the Wheeler-Lea Act to guide you. Instead of writing a comprehensive memorandum to the General Counsel, however, be prepared to discuss and defend the details of your report orally in the classroom.

The weaknesses under the 1906 Act to which the General Counsel made reference are as follows:

Weaknesses in scope and coverage of the 1906 Act

1. An imitation food article could be pawned off to the public as the genuine merely by attaching a distinctive trade name to the product. Take the product "Olivola," a salad oil composed of tea-seed oil and olive oil. Assume that the name "Olivola" appeared on the label, together with a statement of the place where the product was manufactured. An unsuspecting public could readily purchase it as genuine olive oil on the strength of the suggestive name, and because it was sold in a type of container in which pure olive oil was ordinarily sold.

[To exemplify how you should proceed with your assignment:

(a) Turn to the 1906 Act in the Supplement and locate the provision or provisions of the Act which gave rise to the above "weakness." In this instance, it would be:

Section 8. That for the purposes of this Act, an article shall be deemed to be adulterated: * * *

In the case of food: * * *

Fourth. If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same

label or brand with a statement of the place where said article has been manufactured or produced.

(b) Study the above language and ascertain just what it was that caused the difficulty of which the Administrator complained.

(c) Turn to S. 1944 in the Supplement and locate the provision which purports to correct the difficulty. In this case, the section would be:

Section 7. A food shall be deemed to be misbranded
—* * *

(c) If it is an imitation of another food, except that no imitation shall be deemed to be misbranded under this paragraph if its label bears the word "imitation" in juxtaposition with and in type of the same size and prominence as the name of the food imitated.

Section 6. A food, drug, or cosmetic shall be deemed to be misbranded—* * *

(c) If any word, statement, or other information required on the label to avoid adulteration or misbranding under any provisions of this Act is not prominently placed thereon in such a manner as to be easily seen and in such terms as to be readily intelligible to the purchasers and users of such articles under customary conditions of purchase and use.

(d) Determine whether in your judgment, 7(c) and 6(c) of S. 1944 would adequately remedy the defect. For example, would these sections require only three words on the label to bear the same size and prominence, i.e. "Imitation Olive Oil?" What about "Olivola?" Would it still be possible to print this name on the label in such way as to over-shadow the other three words?

(e) Turn to S. 5 and follow the same procedure as in step (c) above. The pertinent section is:

Section 403. A food shall be deemed to be misbranded
—* * *

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word, "imitation" and, immediately thereafter, the name of the food imitated.

(f) Follow the same procedure as in step (d) above. The requirement is "uniform size and prominence." Does this mean that the words can be displayed with little prominence just as long as they are "uniform?" What machinery of control is better: that provided for by S. 5 or S. 1944? Why?

(g) It is not necessary to consider S. 1077, because it clearly is not applicable to the problem.

(h) Skip the question of constitutional power, because no constitutional question seems to be raised by the attack of S. 5 and S. 1944 upon the particular problem.

(i) Determine whether S. 5 and S. 1944 could be improved

upon to remedy the alleged deficiency in the 1906 Act. For example, what of a provision which would require: (1) the word "Imitation," (2) the item imitated, e. g. "Olive Oil" and (3) the trade name, e. g. "Olivola" to be of uniform size—and also to be of sufficient prominence "as to be easily seen and in such terms as to be readily intelligible. * * *

Now that you have some idea of the methodology for your assignment, apply it to the following additional weaknesses under the 1906 Act:]

2. In view of the holding in *U. S. v. Johnson*, 221 U. S. 388 (1911) that the definition of "misbranding" in section 8 of the Act was inapplicable to statements pertaining to the curative effects of proprietary medicines, a manufacturer of nostrums could make therapeutic claims on a label, no matter how false they were.

3. A manufacturer or packer of packaged foods, or of such items as factory-wrapped hams could omit any affirmative declaration of the net weight of the contents of the package. Only if the manufacturer chose to give such a declaration did the Act require that it not be false or misleading.

4. A distributor could ship a quantity of adulterated cream of tartar and phosphate to a manufacturer in another state as long as these substances were merely ingredients which entered into the manufacture of baking powder. The Act, in such a case, would be applicable only when the end product, baking powder, was shipped in interstate commerce.

5. A distributor could make an interstate shipment of a quantity of Burma beans containing hydrocyanic acid, a deadly poison, as long as the poison was a natural yield of the beans.

6. A manufacturer could make an interstate shipment of foods which, although labeled accurately as to weight, measure, and numerical count, were packed in slack-filled containers designed to create in the consumer's mind an illusion of greater content.

7. A misleading label could be placed on an item of canned food by a retailer after it reached its destination, even though at the time it left the factory in New York and was received in Missouri by the retailer the label was proper.

8. A candy manufacturer could ship boxed confections containing metallic trinkets and other inedible substances which, although sanitary, could be swallowed by children with resulting dire consequences.

9. A manufacturer could, on his canned food labels, make unwarranted statements which actually mislead consumers as to the quality of the product as long as these claims were made out

of sheer ignorance, and not out of any willful intent to deceive or defraud.

10. An entirely new drug, potentially fatal if taken as directed,—for example, a drug containing a solution of radium—could, without further obligation by the manufacturer, be put on the market as long as the contents were truthfully labeled, no therapeutic claims were made and the ingredients were not adulterated within the meaning of section 7 of the Act.

11. A drug label for the drug “Az-Muh” could fully and accurately disclose the ingredients of the drug without revealing that it would have no more effect in the treatment of asthma than sweetened water.

12. Misleading claims could be made with respect to cures for obesity or to the value of such devices as diathermic machines or nose and limb straighteners.

13. A non-habit forming drug not listed in the Pharmacopoeia or National Formulary could be released on the market without indicating the ingredients on the label—even though an unsuspecting purchaser might be allergic to one of the ingredients.

14. A cosmetic represented as entirely harmless and beneficial to the skin, but containing thallium acetate, a highly poisonous substance, could be put on the interstate market.

15. To avoid a possible imputation that the directions for the use of a drug might imply a misleading representation of its efficacy, such directions could be omitted entirely from the label by a manufacturer.

16. A manufacturer of a drug containing a narcotic or hypnotic substance could omit from the drug label a warning that it was habit forming.

17. A drug could be labeled “for the treatment of” a certain disease, even though it was only a palliative and not a cure. Prosecution could not be based on the falsity of the label, and it could not be easily proved to be misleading.

18. A drug that had deteriorated in strength could be “pawned off” to the public without divulging its strength on the label—misleading those who, from past experiences with the drug, had reason to believe that it was potent.

19. A drug could be packed and shipped in a package which contained or was composed in part of a poisonous substance.

20. A manufacturer of a drug could make false or misleading claims as to its curative value in newspaper advertisements and broadcasts.

Weaknesses of control machinery under the 1906 Act

21. A manufacturer could continue production and shipment of a drug during the period in which prosecution for

adulteration of the manufactured product was under way. There was no authority to restrain repetitious offenses.

22. Inasmuch as the standards for quality and identity of food were fixed *ad hoc* by each jury, and not by general administrative regulation, a distributor of a food product found adulterated or misbranded by one jury could continue distribution of the product on the chance that another jury elsewhere might have different standards.

23. A manufacturer or distributor could refuse the government permission to inspect factories, warehouses or other establishments in order to determine whether foods or drugs were being prepared or handled under conditions of reasonable cleanliness.

24. Violators of the Act could persist in their violations because the penalties under the Act were so low as to constitute a "license fee for doing an illegitimate business."⁹ Added to this was the paucity of funds available for enforcement. This was made evident by such reports as follows:

"The Food, Drug and Insecticide Administration today is operated on essentially the same financial basis as was the corresponding law-enforcement unit of the department in 1914, notwithstanding the fact that during the intervening 14 years there has been a vast increase in the cost of carrying on the work and in the output of commodities shipped within the jurisdiction of the law."¹⁰

Assignment No. 2: Further Problems on Gauging the Comparative Efficacy of Proposals for Remedying the Weaknesses of the 1906 Act

After the General Counsel mulls over your evaluation of how S. 1944, S. 5 and S. 1077 would deal with the enumerated defects of the 1906 Food and Drug Act, he sends you another memorandum stating that the Administrator has raised some additional questions at a "top flight" staff meeting and that he (the General Counsel) would like to have you answer them to the best of your ability. These questions concerned the efficacy of S. 1944, S. 5 and S. 1077—scope and coverage, control machinery and constitutional power. Here are the questions assigned to you:

(Report on each one orally in class.)

As to scope and coverage:

1. Suppose there is a shipment of adulterated milk from an Illinois receiving station of a dairy to the same dairy com-

⁹ This quotation is from the Report of the Chief of the Food and Drug Administration for the fiscal year ended June 30, 1931, p. 4.

¹⁰ Report of the Food, Drug, and Insecticide Administration, June 30, 1928, p. 2.

pany in Missouri for the purpose of treating the milk, removing the impurities, and standardizing it. Would this constitute a violation under the proposed legislation? What of rejected misbranded merchandise being returned in interstate commerce by the consignee to the shipper for credit?

2. In view of the fact that it was the "introduction . . . of any article or food which is adulterated or misbranded" into commerce, which constituted the major offense under the 1906 Act, it was not clear whether the Act would encompass a situation in which a shipment of food became adulterated by contamination with a poisonous substance while in transit in interstate commerce. Do the proposals clarify this situation? How?

3. A grain dealer, in filling an order for No. 2 red wheat, ordered the operator of a public elevator where the grain was stored to ship it to the consignee. It was loaded, inspected and certified by an official state inspector to be No. 2 red wheat, and then shipped out of state to a consignee in Texas. However, a federal inspector in the latter state determined the shipment to be mixed wheat and not No. 2 red wheat. The dealer was convicted for misbranding and adulterating under the 1906 Act. The Circuit Court of Appeals in *Hall-Baker Grain Co. v. United States*, 198 F. 614 (C.C.A. 9th 1912) reversed, stating among other things, that "the act of Congress was not enacted to catch and punish merchants who are conducting their business by customary and approved methods with no intent to deceive purchasers, or to injure the public health, for the mistake of third persons over whom they have no control, nor for trivial errors of their own, which at first blush may seem to bring their action within the prohibition of the law, but by which, in reality, they violate neither its letter nor its spirit." What might the holding be under the proposed legislation if the identical state of facts existed?

4. What of the ingredients in cosmetics? Any requirement that they be revealed on the label?

5. Are misrepresentations in advertisements proscribed whether or not they pertain to any particular product or its ingredients? Suppose, for example, the advertisement pertains to the curative wonders of grapefruit juice, generally. Compare section 8 of the 1906 Act, where "misbranding" is presumably determined by the "statement, design or device" on the package or label of the specific product.

6. Note that an advertisement must be misleading in a "material" respect, in section 15 (a) of the Wheeler-Lea proposal. Note also, the view in the Restatement of Torts (1938) sec. 538 that, "A fact is material if (a) its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction

in question, or (b) the maker of the representation knows that its recipient is likely to regard the fact as important although a reasonable man would not so regard it." How useful would such a construction of "material" be to those consumers who do not act as "reasonable men," but rather as "gullible men" who are either persuaded or duped by false exaggerations and misleading emotional appeals contained in advertisements? Would it be more feasible to predicate the offense not upon "materiality," but merely upon the falsity of the advertisement, with varying degrees of punishment for varying degrees of flagrancy?

7. In order to constitute a statutory offense, would it be necessary, under the proposed legislation, to show that the advertiser actually knew that the advertisement misrepresented the effect, say, of a drug? In other words, would *scienter* be an element of the offense? Would it be necessary to show that the consumer relied upon the false advertisement?

As to control machinery

8. Suppose the government spotted a shipment of food which it found to be imminently dangerous to health. Would there be any power of summary executive seizure, or would resort have to be made through regular judicial processes in order that a seizure may be effectuated? What would be the difference in effect between the two types of seizures?

9. Would there be any requirement that a manufacturer be given notice and an opportunity to be heard prior to the institution of seizure proceedings? Would good faith be a good defense in such proceedings?

10. *United States v. Five Boxes of Asafoetida*, 181 F. 561 (E. D. Pa. 1910) involved a shipment of adulterated drugs—adulterated because its potency was below the standard of strength indicated in the Pharmacopoeia. While in their original packages and prior to seizure, the labeling was corrected—pursuant to section 7 of the 1906 Act—to indicate the actual strength of the drugs. The court held that, where adulterated drugs had been transported in interstate commerce and remained in their original unbroken packages, but the labeling had been corrected prior to the time of seizure, the shipment could not be subject to seizure proceedings. Is this limitation on the seizure power contained in the proposed legislation?

11. From the standpoint of affording a powerful mechanism of control, one good feature of the 1906 Act was that it was possible under section 10 to commence libel proceedings against all of the shipments of a particular commodity. Is the same power available under the proposed legislation?

12. To what extent, if at all, would the government have the authority to impose the sanction of publicity against those who harm the public by trafficking in adulterated or misbranded

goods? In your judgment, how effective would such a sanction be? How desirable?

13. Under the 1906 law, a shipment of drugs may have been manufactured in Nebraska, but seized in Pennsylvania. Seizure proceedings were instituted in the court in the district where the shipment was found—unlike the procedure in criminal prosecutions, where the trial would be in the district in which the crime had been committed. It is apparent that, under this procedure, a small manufacturer might well have found it too costly to defend the seizure action in Pennsylvania. On the other hand, the government would not have wished to relax the enforcement of the law by permitting the questionable products to be at large. How is this problem resolved, if at all, under the proposed legislation?

14. Is any provision made for awarding court costs and fees and storage charges to a claimant who succeeds in a seizure action against the government? Suppose, too, that in a seizure proceeding, a shipment of perishable food is found unadulterated, but that it becomes adulterated immediately upon consummation of the seizure proceedings. Who would bear the loss?

15. Is there any requirement for the affirmative disclosure by a manufacturer of information concerning food, drug or cosmetic products in advertisements, or is there merely a requirement that falsehoods be suppressed?

16. On the question of duplicated procedures, which would exist under the Wheeler-Lea plan, would the failure of the Food and Drug Administration to establish by court decision the falsity of statements with respect to labeling constitute a bar to a proceeding by the Federal Trade Commission to prohibit the dissemination of the same statements in an advertisement? (After you have resolved this problem by examining the legislative proposals, see *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583 (C.C.A. 8th, 1940). Does this case rely on the wording of the statute involved to resolve the problem? Could a result opposite that reached in the Lee case be obtained by legislation if Congress so desired it? If yes, how?)

17. From the government's point of view in achieving the given objective, how desirable would the division of enforcement powers be between the Federal Food and Drug Administration and the Federal Trade Commission? What criteria of "desirability" would you propose? (Some light on this problem may be shed by reading the account of the background of the fight for jurisdiction over false advertising in *Cavers, The Food, Drug and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 *Law and Contemporary Problems*, 2, 17 (1939), reprinted *infra*, p. 267).

18. Who would have the burden of proof in an injunctive

proceeding involving a "false advertisement"—the accused, to prove the truth of the advertisement, or the government, to prove its falsity? Which would be the more feasible method to follow?

19. What specific acts are subject to the injunctive relief under the proposals? Just what would the injunctive device endeavor to accomplish?

20. Would lack of intent be a defense to the procurement of an injunction under the proposed legislation? Would good faith be a good defense in a seizure proceeding?

21. What would be the nature and extent of the administrative powers under the proposed legislation as compared with such powers under the 1906 Act? What would the administrative powers accomplish? In what circumstances would it be more desirable to leave the regulatory activity to administrative discretion rather than to legislative fiat? For example, would it be more or less feasible to entrust an administrative body with regulatory powers over the subject matter contained in section 502 (d) of S. 5? In your consideration of this problem, it will be helpful to consult the Report of the Attorney General's Committee on Administrative Procedure (1941), Sen. Doc. No. 8, 77th Cong. 1st Sess. 11-17.

22. Is there any provision under any of the proposals for compelling the Administrator to give advisory opinions as to the legality or illegality of the prospective sales activities of a drug manufacturer? Would such a provision be desirable?

23. Are there any emergency powers to cope with a situation in which, say, an epidemic in a community may subject food ready for shipment to the exposure of dangerous micro-organisms?

24. Under section 5 of the 1906 Act, the United States attorney was duty bound to institute criminal proceedings when a case was referred to him by the Secretary of Agriculture. Would the same procedure apply under the proposed legislation? If not, what would be the potential effect of the changes, if any?

As to power

25. Would any of the proposals proscribe the making of a contract for an interstate shipment of misbranded goods? Would they in any way directly regulate the conduct of the corner grocery? Would there be constitutional power to obtain this objective?

26. Are there any other aspects of the proposals which might raise any serious constitutional questions? For example:

(a) Are the standards for criminal conduct sufficiently definite to meet the requirements set forth in *United States v. Cohen Grocery Co.*, 255 U. S. 81, 65 L ed. 516, 41 S. Ct. 298

(1920). Is this problem obviated by permitting administrative refinements of the broad legislative standards? See in this respect, *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42 (1932), reprinted *infra* p. 74, particularly at p. 77.

(b) Are the delegations of authority to administrative bodies constitutionally feasible? On the problem of delegation generally, see Weeks, *Legislative Power Versus Delegated Legislative Power*, 25 *Georgetown L. J.* 314 (1937); Nutting, *Congressional Delegations Since the Schechter Case*, 14 *Miss. L. J.* 350 (1942).

(c) Does the adoption of the standards of private organizations—the U. S. Pharmacopoeia and the National Formulary—in the determination of the adulteration of drugs constitute an unlawful “delegation” of authority? A valuable aid to the understanding of this problem may be found in Jaffee, *Law Making by Private Groups* (1937) 51 *Harv. L. Rev.* 201.

II

C. TESTING THE ACCURACY OF PREDICTIONS CONCERNING THE EFFICACY OF PROPOSED LEGISLATION: LAW IN BOOKS V. LAW IN OPERATION

In the “assignment” for the special counsel, *supra*, p. 25 it will be noted that it was assumed “that S. 1944, S. 5 and S. 1077 would, if enacted, be *properly administered*.”¹¹ This assumption, of course, envisages the ideal situation, which, in practice, rarely achieves realization. Often, what a law does falls considerably short of what a law says, because the human element which is involved in its administration is difficult, if not impossible, to predict. There are those, therefore, who believe that what the law is can be no more than what the law does,¹² and to ascertain what the law actually does can be determined only by measuring the results of the law in actual operation. The experience during the era of national prohibition with the widespread flouting of authority, the laxity of enforcement, etc., should give pause to those who rely on the mere words of the law to ascertain just what the law will actually do.

To determine whether the means proposed actually effectuate the ends envisaged by the drafters of the Food, Drug and Cosmetic Act of 1938 would require careful, scientific studies designed to answer such questions as: (1) What penalties are

¹¹ Emphasis added.

¹² This is the view of the “functionalists,” one of the most articulate of whom has been Felix S. Cohen. In his *The Problems of a Functional Jurisprudence*, 1 *Modern L. Rev.* 5 (1937), his view is summed up as follows: “If you want to understand something, observe it in action.”

actually imposed by the courts; (2) Do the criminal penalties actually deter the prohibited behavior; (3) Are the adulteration and misbranding of food, drug and cosmetic products on the decrease; (4) Is the operation of the seizure or injunction machinery too slow to afford proper protection to the consuming public; (5) Does the government have sufficient manpower to police the Act; (6) How efficient or lax is its enforcement; (7) Is the consumer satisfied with the protection he is obtaining under the Act, etc.? A great deal of this information may be obtained by ordinary investigations by legislative committees, as was done in assaying the merits of the 1906 Act. Other information, however, might be more difficult to obtain—involving techniques of sampling and measurement that would tax the best of our social and other scientists. Unfortunately, our experience has been to await some dramatic incident to focus our attention upon the need for investigating the operation of law in action. The death of 73 persons in 1937, resulting from the use of the deadly drug, Elixir Sulfanilamide Massengil, brought quick results from the legislators. Such patient studies as Criminal Justice in Cleveland, or as are involved in the T. N. E. C. monographs are, regrettably, still the exception rather than the rule. It would seem, however, that, unless such an empirical approach to legislation is taken—unless there is an attempt to understand law in terms of all that enters into it and affects its operation—the means-end problem does not emerge from the stage of abstraction and speculation to which the lawyer is subjected when he is asked to gauge the efficacy of proposed legislation. Past experiences will aid him to some extent in determining the possible effect of certain legislative machinery upon the end sought to be achieved, but often the same machinery in different contexts produce different, unexpected results. To know just what the results are and what, if anything, may be done to correct initial “hunches” as to what legislation might do, can only be ascertained by observing its effects in actual operation. For example, in dealing with criminal repeaters or “recidivists” amongst the mentally disordered offenders, a persistent practice has been to enact legislation which prescribes increased sentences for repeaters—this on the theory that increased sentences would reduce repeated crimes.¹³ But an examination of recidivists in the present prison population has disclosed that recidivism still continues to preponderate with mentally disordered offenders.¹⁴ Or take the case of legislation designed to hold municipal corporations liable to innocent vic-

¹³ *Toward Rehabilitation of Criminals—Appraisal of Statutory Treatment of Mentally Disordered Recidivists*, 56 Yale L. J. 1085 (1948).

¹⁴ See Gregory, *Psychiatry and the Problems of Delinquency*, 91 Am. J. Psychiatry 733, 777 (1935).

tims for torts committed by the officers or employees of municipal corporations in the course of their employment. Many who criticized such a measure were of the opinion that it would encourage fraud and excessive litigation, and would result in burdening the public with an unbearable cost. But careful statistical and other studies of municipal tort liability in operation have revealed the fears of excessive litigation, fraud and unreasonable cost to be unfounded.¹⁵ It is obvious that the lawyer *qua* lawyer cannot be expected to be expert in the methods and techniques of the sciences in order to conduct the studies necessary to measure the various effects of legislation in operation. By virtue of his training, he should be expert in ascertaining at least one of the effects of law in operation, however,—i.e., what the courts have done to it. But to get a rounded picture of legislation in action, i.e., its economic, psychological, sociological, etc. effects, it is obvious that the skills of other specialists would have to be employed. The teaming up of the lawyer with experts in the related fields—the pooling of all related knowledge—should do a great deal to generate a much needed realism in the study of the means-end problem in legislation.

¹⁵ See Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437 (1941), for the operation of municipal tort liability in Boston. For references to studies in other municipal areas see Fuller and Casner, *ibid* (f) p. 437.

CHAPTER 2

ASCERTAINING THE "MEANING" OF AMBIGUOUS LEGISLATIVE LANGUAGE

A. INTRODUCTORY NOTE

No matter how careful the draftsman might be in the preparation of legislation, there will always be controversies over the meaning of its language. This is not peculiar to legislative language but to language in general. It is not an uncommon experience to observe: "I know what he says and I have read what he has written, but what does he mean?" This is not to say that all language is unintelligible, for obviously that would mean that no communication at all were possible. It is merely to say that words—which, after all, are but labels for living thoughts—often fail to convey the thoughts of those who use them. This may be due to the fact that the word labels selected by the user are so broad as to leave the communicant guessing which of any number of possible objects or situations are intended to be covered. Ogden and Richards in their work, "The Meaning of Meaning"¹ use the term "referent" as a convenient tool for describing the object or situation to which a word label refers. Minds meet and the lines of communication become cleared when the referent is found. Indeed, the semanticist would insist that the major task confronting those who, like lawyers, are concerned with the meaning of language, is to locate the referents. This might, at first blush, seem a simple task, but a moment's reflection will indicate how complicated it might become. In the lower levels of communication, the referents would seem to be comparatively easy to spot. For example, the command: "Go to bed," the direction: "Turn left at the next corner," or the requirement that: "Beer may not be sold to children under 21." But even here, it is not uncommon for courts—because they do not like the consequences of the language—to hold that there is an ambiguity, despite the fact that to the casual observer the literal language is perfectly clear and plain. Indeed, there are some who would insist that courts often create ambiguities even when they actually may not exist—in order—by the process of "interpretation" to reach what it deems to be more desirable results. In the higher levels of abstraction even greater difficulties set in. Let alone such concepts as "due process of law," "interstate commerce," "obligation of contract," etc., which appear in the language of constitutional law, statu-

¹ Harcourt Brace and Company (1947).

tory law is replete with examples of words or expressions which give rise to considerable controversy as to the nature of their referents. For example, when a statute makes "monopolies" illegal, it is not clear whether only business and not labor monopolies are intended; or when it is made unlawful to transport any woman or girl for the purpose of prostitution or for "any other immoral purpose," it is not certain whether the latter phrase is to be limited only to commercialized vice. Again, take Section 301(a) of the Federal Food Drug and Cosmetic Act of 1938, which proscribes "the introduction or delivery for introduction in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." In the definition section of the Act, "device" is defined as "instruments, apparatus and contrivances including their components, parts, and accessories intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in man or other animals; or (2) to affect the structure or any function of the body of man or other animals." Despite this attempt at foreclosing controversy as to the meaning of the term "device," a flood of questions have been raised in and out of court concerning it. Does it, for example, include clinical thermometers, combs labeled "For Dandruff and Scalp Infection," razor blades, tooth brushes labeled "To Be Used By Persons With Soft Gums," wooden tongue depressors, surgical rubber gloves, hot water bottles, dental materials used to take impressions for making dentures, and manicuring instruments? And more of such questions will undoubtedly follow. In some instances, greater precision in drafting might clarify the referents and thus minimize the controversies over "meaning." But in other instances, the language must, of necessity, be left broad—and this for a number of reasons, e.g., (1) the inability of legislators to foresee the possible situations which might arise under the law, (2) the desire to shift to courts or administrative bodies the responsibility for refining legislative policy, (3) the desire to avoid the implication that, if something was inadvertently omitted it was intended to be excluded and (4) the dread of increasing the already unwieldy physical bulk of statutory law. But whatever the reasons, the job of "construing" or "interpreting" the meaning of ambiguous legislative language still remains one of the lawyer's major tasks. In the face of such language, the client will still want legal advice as to what it means, so that he may guide his conduct accordingly. And when contested, the lawyer will be called upon to defend his version before a court or quasi-judicial tribunal. The following materials should be of aid in revealing to the would-be lawyer the methodology of the courts in resolving "ambiguities" in legislative language; they should also exemplify some of the weapons which might be at his disposal, as well as some of the

skills which might be employed for persuading a court to adopt a desired interpretation and reject a competing version of ambiguous legislative language.

B. BACKGROUND MATERIALS

FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES²

47 Columbia L. Rev. 528-546 (1947)³

* * *

Difficulties of Construction

Though it has its own preoccupations and its own mysteries, and above all its own jargon, judicial construction ought not to be torn from its wider, non-legal context. Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. * * *

The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction. The process of construction, therefore, is not an exercise in logic or dialectic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. * * * In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem. * * * the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.

Scope of the Judicial Function

. . . The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: What is below the surface of the words and yet fairly a part of them? Words in statutes are not unlike words

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³ The selected footnotes have been renumbered.

in a foreign language in that they too have "associations, echoes, and overtones." Judges must retain the associations, hear the echoes, and capture the overtones. . . .

Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. * * *

The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law. To say that, because of this restricted field of interpretive declaration, courts make law just as do legislatures is to deny essential features in the history of our democracy. It denies that legislation and adjudication have had different lines of growth, serve vitally different purposes, function under different conditions, and bear different responsibilities. The judicial process of dealing with words is not at all Alice in Wonderland's way of dealing with them. Even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them. Other law terms like "police power" are not symbols at all but labels for the results of the whole process of adjudication. In between lies a gamut of words with different denotations as well as connotations. There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators. They are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty. * * *

The Process of Construction

The text.—Though we may not end with the words in construing a disputed statute, one certainly begins there. . . . The Court no doubt must listen to the voice of Congress. But often Congress cannot be heard clearly because its speech is muffled. Even when it has spoken, it is as true of Congress as of others that what is said is what the listener hears. Like others, judges too listen with what psychologists used to call the apperception mass, which I take it means in plain English that one listens with what is already in one's head. One more caution is relevant when one is admonished to listen attentively to what

a statute says. One must also listen attentively to what it does not say.

We must, no doubt, accord the words the sense in which Congress used them. That is only another way of stating the central problem of decoding the symbols. It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation "The word was addressed to the Indian mind."⁴ If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of specialists.

And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men. * * *

. . . "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But, as we have said, the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops."⁵ Or words may acquire scope and function from the history of events which they summarize or from the purpose which they serve.

. . . The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

The context.—Legislation is a form of literary composition. But construction is not an abstract process equally valid for every composition, not even for every composition whose meaning must be judicially ascertained. The nature of the composition demands awareness of certain presuppositions. For instance, the words in a constitution may carry different meanings from the same words in a statute precisely because "it is a constitution we are expounding." . . .

Frequently the sense of a word cannot be got except by fashioning a mosaic of significance out of the innuendoes of disjointed bits of statute. Cardozo phrased this familiar phenomenon by stating that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together

⁴ *Fleming v. McCurtain*, 215 U. S. 56, 60, 54 L. ed. 88, 30 S. Ct. 16 (1909).

⁵ *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48, 73 L. ed. 170, 49 S. Ct. 52 (1928).

and in their relation to the end in view.”⁶ And to quote Cardozo once more on this phase of our problem: “There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.”⁷

. . . it was Holmes, who said that “the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.”⁸ * * *

Proliferation of Purpose

. . . Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate. * * *

The difficulty in many instances where a problem of meaning arises is that the enactment was not directed towards the troubling question. . . . But the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.

Often the purpose or policy that controls is not directly displayed in the particular enactment. Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion. Thus, for example, it is not lightly to be presumed that Congress sought to infringe on “very sacred rights.”⁹ This improbability will be a factor in determining whether language, though it should be so read if standing alone, was used to effect such a drastic change.

. . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Gov-

⁶ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433, 439, 79 L. ed. 446, 55 S. Ct. 241 (1935) (dissenting).

⁷ *Duparquet Co. v. Evans*, 297 U. S. 216, 218, 80 L. ed. 591, 56 S. Ct. 412 (1936).

⁸ *United States v. Whitridge*, 197 U. S. 135, 143, 49 L. ed. 696, 25 S. Ct. 406 (1905).

⁹ *Milwaukee Social Democrat Publishing Co., United States ex rel. v. Burleson*, 255 U. S. 407, 438, 65 L. ed. 704, 41 S. Ct. 352 (1921) (dissenting).

ernment takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

Search for Purpose

How then does the purpose which a statute expresses reveal itself, particularly when the path of purpose is not straight and narrow? The English courts say: look at the statute and look at nothing else. * * *

These current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. * * * In earlier centuries the judges recognized that the exercise of their judicial function to understand and apply legislative policy is not to be hindered by artificial canons and limitations. The well known resolutions in Heydon's Case have the flavor of Elizabethan English but they express the substance of a current volume of U. S. Reports as to the considerations relevant to statutory interpretation. * * *

At the beginning, the Supreme Court reflected the early English attitude. * * * This commonsensical way of dealing with statutes fell into disuse, and more or less catchpenny canons of construction did service instead. * * *

. . . [But now] Courts examine the forms rejected in favor of the words chosen. They look at later statutes "considered to throw a cross light" upon an earlier enactment.¹⁰ The consistent construction by an administrative agency charged with effectuating the policy of an enactment carries very considerable weight. While assertion of authority does not demonstrate its existence, long-continued, uncontested assertion is at least evidence that the legislature conveyed the authority. Similarly, while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given. And since "a page of history is worth a volume of logic,"¹¹ courts have looked into the background of statutes, the mischief to be checked and the good that was designed, looking sometimes far afield and taking notice also as judges of what is generally known by men.

. . . While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. * * *

¹⁰ United States v. Aluminum Co. of Amer., 148 F. 2d 416, 429 (C. C. A. 2d 1945).

¹¹ New York Trust Co. v. Eisner, 256 U. S. 345, 349 (1921).

Canons of Construction

. . . Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements. . . . So far as valid, they are what Mr. Justice Holmes called them, axioms of experience.¹² . . .

Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. * * *

Fair Construction and Fit Legislation

. . . Loose judicial reading makes for loose legislative writing. * * *

But there are more fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language. * * *

Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfilment of both these august functions is to entrust them only to those who are equal to their demands.

MORRIS R. COHEN, LAW AND THE SOCIAL ORDER (1933)¹³

pp. 128-131, 133-134¹⁴

. . . Perhaps the day is not far distant when a scientific psychology of written language will be in a position to offer definite data to the jurist, but the prevailing technical rules of construction are not of this character. They come down to us largely from the Roman law, and their main function, so far as they partake of the nature of rules, is first, to introduce certainty by fixing a meaning in cases where conflicting meanings are otherwise possible (all questions of meaning for the court arise, of course, through the fact that two different meanings are

¹² *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48, 73 L. ed. 170, 49 S. Ct. 52 (1928).

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¹⁴ The selected footnotes have been renumbered.

claimed by the contending parties), and, secondly, to subordinate the intention of the parties to considerations of public policy and the convenience of judicial administration. Just as the rules of evidence are, in the main, fashioned to exclude what is logically probative, so our rules of interpretation and construction of written instruments are, for the most part, rules for the exclusion of inquiry into the actual psychological intention. Considerations of public policy and of the convenient administration of justice require us to attach certain consequences to words, irrespective of the actual intention of the writer. It is because of such considerations, and not in the interest of scientific truth, that the rules for the interpretation of wills differ from the rules for the interpretation of contracts or deeds, and the rule of executory from those of executed trusts. Again, a blind fear of paternalism makes us say that the proper duty of the court is to interpret people's contracts, to give effect to their actual intention, and not to make contracts or impose obligations that the parties did not intend when they contracted. But as a matter of fact most of the disputes about contracts arise because of the emerging of unexpected conditions that were not in the contemplation of the parties when they made their agreement. In all such cases the courts do not enforce the real intentions of the parties, for there were none, but decide on the rights of the contestants in accordance with their sense of the equities of the case or the suggestion of analogous rules of legal obligation.

These considerations are suggestive in enabling us to avoid some confusing fiction in the theory of statutory interpretation.

Austin, Lieber, and most eminent writers after them define interpretation as the discovery of the true meaning of a statute or law. In harmony with the phonograph theory of the judicial function, this true meaning is lodged in the mind of the legislature, and the upright judge simply finds it and in no way modifies it. In actual judicial interpretation, however, this is certainly not always true. If I have any difficulty in interpreting a passage in a book, I consider myself fortunate if I can interrogate the author himself. But for the courts to ask those who actually drew up a statute what they meant would be absurd.¹⁵

. . . the legislative intent is an eliminable fiction. Experience amply shows that the drafters or framers of a law, the committee that reports it, the majority of the members of the two houses that, for various reasons, pass it, and the executive that signs it are by no means always agreed as to its meaning. Hence

¹⁵ Thus Lord Halsbury distinctly asserts that the worst person to construe a statute is the person who drafted it, because he tends to confuse what he intended to say with what he actually said. (*Hilder v. Dexter* (1902) A. C. 474, 477). A judge who drafted a bill must thus divest his mind of all past impressions of it. In *re Mew and Thorne*, 31 L. J. Bcy (1862) 87.

the rule that parliamentary debates are of no direct value in the interpretation of statutes.

Back, however, of the motives and ideas of the various individuals who constitute the legislature are the various interests concerned in the passing of a measure into law. We do not, of course, avoid fiction altogether by calling the triumph of one of these interests or the final compromise between conflicting claims "the will of the people." But such language brings us nearer to the actual procedure of courts in interpreting statutes, and helps us to understand the real significance of the statement that courts interpret not the actual intention of the legislator but the meaning of the statute before them.

What is the meaning of a statute? The rule that courts must interpret the meaning of the statute rather than the intention of the legislature is frequently conceived as if it implied that the words of a statute are sufficient to determine every question that arises under it. This would lead to a revival of the stage of strict law in which the strictly literal meaning of words is followed no matter how unjust or absurd the consequences. Doubtless there are many who still believe juristic interpretation to be a kind of magic whereby a whole body of law is made to spring out of a few words or phrases. But most modern jurists are outgrowing the superstitious awe of the printed word and its magic potency. The meaning of a statute consists in the system of social consequences to which it leads or of the solutions to all the possible social questions that can arise under it. These solutions or systems of consequences cannot be determined solely from the words used, but require a knowledge of the social conditions to which the law is to be applied as well as of the circumstances which led to its enactment. Legal rules relate to human life, and grammar or formal logic alone will not enable us to deduce their juridical consequences. The proof of the fact that the interpretation of legal rules is impossible without an intimate knowledge of the factual world to which they are to be applied, is seen in the many rules of Roman law that are today unintelligible because we do not know sufficiently under what conditions they were intended to work. The meaning of a statute, then, is a juridical creation in the light of social demands. It decides not so much what the legislature actually intended, nor what the words of a statute ordinarily mean, but what the public, taking all the circumstances of the case into account, should act on.

Consider the rules of statutory interpretation laid down in any text-book, for example, that penal statutes, or statutes in derogation of the common law, should be strictly construed, that remedial statutes should be liberally construed, and that there is an almost conclusive presumption against an unreasonable

or inconvenient intention on the part of the legislator. These are not scientific rules for the discovery of actual intentions or the meanings of words, but maxims of public policy to guide judges in the process of making law out of statutes. It is notorious that the assumption of legislative reasonableness and regard for public welfare is one that judges privately do not hold, but public policy requires it in the administration of law. It is certainly only from this latter point of view that we can find any rationale in the rules against retroactivity. * * *

. . . Legislatures are the commissioners of warring social interests. They can draw up general treaties of peace, but the details have at all times been and must be inserted by the courts, else we should have a constant recurrence to a state of lawlessness. Courts must necessarily attach a somewhat different meaning to statutes than do the legislators, owing to the necessarily different point of view. The conditions of legislation make legislators view even the most general statutes exclusively as measures of relief to certain social demands. Courts, however, must construe them as integral parts of the legal system that controls the whole of life. Legislators can never have in mind all the possible consequences of their enactments, and many of them would be shocked and would refuse to pass the bills they do if they could realize these consequences. Hence, every system of legal administration that is not impossibly rigorous allows the judge, who has had the chance of seeing the actual working of the statute in concrete situations, some power of amendment—hard and fast legal and political theories to the contrary notwithstanding.¹⁶

The process by which the terms of laws are widened or narrowed has been called spurious interpretation. Such interpretation is spurious only so far as it pretends to discover the actual intention of the legislator, but the process of extending or restricting the meaning of a statute is inevitable. Unless we are wilfully to blind ourselves by some dogma of legislative omniscience, we must recognize that supplementary legislation by judges or other administrative officials is absolutely necessary to make statutes workable. Statutes must be expressed in gen-

¹⁶ The view that interpretation is exclusively a judicial function has no basis in the old common law or in the practice of any government (both Coke and Blackstone, Whig and Tory, admit the power of Parliament to expound the law). Interpretation, as Wigmore has pointed out (Wigmore, Evidence, 2d ed., 1923, Vol. IV, sec. 2458 et seq.), is essentially a process of realization, i. e., a process of translating maxims into actual human arrangements; and it is necessary not only to all who take part in the administration of law but to the legislature as well. That every department of the government must interpret the law or it could not act, was recognized by Chief Justice Parsons in *Kendall v. Kingston*, 5 Mass. 524, 533 (1809). The Continental view is well expressed by Barthelemy, in "Notes Parlementaires," *Revue du droit public*, July, 1908, pp. 476 et seq.

eral and more or less abstract terms. To make a detailed description of specific human actions forbidden or allowed and their consequences would be an endless and impossible task. The judge, however, must apply the general rule to specific cases. To prevent an impossible uniformity or rigour, and to give statutes a form and content that will adapt them to the complicated needs of life, judges must classify the cases under the rule and use what is called equitable interpretation as a corrective or supplement to the abstract generality of the law before them. . . . The extent to which this latter rule is carried can be shown by the fact that courts will, in the interests of equitable interpretation, change the tense of a statute, interpret the phrase "single man" to include widows, or the term "woman" to exclude married women, and the like. Nothing is more usual in the interpretation of statutes than to find them construed as operating between certain persons only, or for certain purposes only, though the language expresses no such limitation; or cases where the language is extended to include things that were not known and could not have been contemplated by the legislators when the statute was passed—for example, when the word "telegraph" is held to cover the telephone invented subsequent to the law in question.¹⁷

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GLANVILLE L. WILLIAMS, LANGUAGE AND THE LAW (1945)¹⁸

61 Law Quarterly Review 71, 302-303, 402-404;

62 Law Quarterly Review 387, 388-389¹⁹

* * *

. . . Since the law has to be expressed in words, and words have a penumbra of uncertainty, marginal cases are bound to occur. Certainty in law is thus seen to be a matter of degree. Correlatively, the theory destroys the illusion that the function of a judge is simply to administer the law. If marginal cases must occur, the function of the judge in adjudicating upon them must be legislative. The distinction between the mechanical administration of fixed rules and free judicial discretion is thus a matter of degree, not the sharp distinction that it is sometimes assumed to be. This is not to say that judges have an unlimited legislative power. A judge has a discretion to include a flying-

¹⁷ *Attorney General v. Edison Tel. Co.*, 6 Q. B. D. 244 (1880). One of the most usual ways in which courts supplement a statute is by supplying definitions, for instance, defining "person" in the Fourteenth Amendment to include corporations. Again, if the legislature in an income-tax law defines "income" to include the unearned increment of land value, there is no doubt that this is substantial legislation. Would it be less so if, in the absence of legislative expression, the courts would so define it?

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¹⁹ The footnotes have been omitted.

boat within a rule as to ships or vessels; he has no discretion to include a motor car within such a rule.

If it be recognized that a judge when operating within the fringes of meaning is not interpreting a pre-existing intent but is exercising a legislative power, the conclusion ought to be that less attention should be paid to dictionary meanings and more to legislative policy. . . .

* * *

. . . It is common form among judges to deny that they ever read into a contract or other document anything other than what, in their view, the parties actually intended; and occasionally they have even gone so far as to say that the implication must be collected from the words of the document itself. These statements cannot be taken seriously. It is true that the declaration of presumed actual intention is the commonest form of implication; but it is not the only form. Courts frequently import into a document terms that are not logically implied in it, and that the parties probably did not think about: or, to say the least, such terms are imported whether or not in the particular case it is probable that the parties thought about them. Examples of such terms "implied" into contracts by rules of law are the implied conditions of reasonable fitness and merchantable quality on a contract of sale of goods, the rule that payment and delivery of goods are concurrent conditions, the implied warranty of seaworthiness, the implied condition on the letting of a furnished house that it is reasonably fit for habitation, the implied promise by one who agrees to build a house that the house will be reasonably fit for habitation, the implied promise by a servant not to disclose secret processes, not to hand over to a rival written work completed for the master, and not, while still in his master's employment, to solicit the master's customers to transfer their custom to himself, the implied promise by an employer (in some cases) to furnish work, the implied duty of care in the carriage of passengers and in looking after bailed goods, and the implied promise by a banker not to disclose the state of his customer's account.

The view may perhaps be held that this particular process is not very happily called "implication." It is not so much the interpretation of a pre-existing and expressed intent as legislation amending or supplementing the expressed intent. Terms so read into the contract might better be called "constructive" than "implied." However, this is simply a question of nomenclature; . . . in declaring the probable or hypothetical-probable intent of a testator or Legislature the judge naturally tends (however much he may deny it) to go upon his own ideas of policy, convenience or justice. Further, there are certain rules of construction of wills and statutes that may, if desired, be thought

of as implied (constructive) terms, such as the rule that "children" does not include illegitimate children, or that statutes do not bind the Crown in the absence of express words or necessary implication. . . .

* * *

The Emotive Function of Words

* * *

One result of this aspect of language is that every statement of fact can be put in such a way as to excite a feeling either of attraction or of repulsion, so far as language can do it. In particular, there exist in language many pairs of words that are capable of symbolizing the same referent but express emotionally opposite attitudes. While apparently expressing a trait of the thing referred to, they in fact express, at least in part, the attitude of the person making the reference. Hobbes noted this a long time ago. "In reasoning," wrote Hobbes, "a man must take heed of words; which besides the signification of what we imagine of their nature, have a signification also of the nature, disposition, and interest of the speaker; such as are the names of Vertues and Vices. For one man calleth wisdome, what another calleth feare; and one cruelty, what another justice; one prodigality, what another magnanimity; and one gravity, what another stupidity, etc." The list could be greatly extended: from the language of law and politics one might instance such pairs as "liberty" and "license," "government" and bureaucracy," "conservation" and conservatism," "radicals" and "reds," "procedure" and "technicality." * * *

* * *

It should also be pointed out that just as there is nothing to blame in emotion as such, so there is nothing to blame in the emotive use of language as such. The use of language for the purpose of stamping conduct with approval or disapproval, or of obtaining an affective response, is not necessarily objectionable. For example, it is of the highest social importance that people should react in words as well as in actions against anti-social conduct. But the emotive use of words is objectionable if, as so often, it hinders thought.

* * *

MAX RADIN, STATUTORY INTERPRETATION²⁰

43 Harv. L. Rev. 863, 869-885 (1930)²¹

* * *

A statute is neither a literary text nor a divine revelation. Its effect is therefore neither an expression laden with innumerable emotional overtones nor a permanent creation of infallible

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²¹ The selected footnotes have been renumbered.

wisdom. It is a statement of a situation, or rather of a group of possible events within a situation, and as such is essentially ambiguous. This word is a pejorative expression in the mouths of most persons and seems to suggest that an ambiguous sentence can have two contradictory meanings; that, for example, it can permit what it seems to forbid. But of course that is not what the word "ambiguous" ought to suggest. A statement is ambiguous if there are two possible meanings—any two—and it can make no difference whether or not they partially contradict each other.

If therefore a group of events is described in a statute, there must at least be two which will fit that description, and since events are unique, any description of a group is almost by definition ambiguous. But although "unambiguous" and "plain" have been equated, the equation is not quite justified. It is still possible to find a plain statute, even though its meaning involves several things rather than one.

Mr. W. E. Johnson, whose *Logic*²² is one of the most considerable of recent contributions to this much-discussed subject, has given us in his differentiation of determinables and determinates a valuable instrument for presenting the meaning of statutes. The situation described in a statute is generally a determinable; that is to say, it is a statement which involves a number of possible events or individualizations, any one of which would be correctly described by that determinable. A determinable of this sort can be made more nearly determinate by reducing the number of possible individualizations, and it becomes quite determinate when it is so expressed that there is only one.

A statute which ratifies a particular past act by a named person deals with a determinate event. So does a private bill, granting a pension to a named person or divorcing a named couple. Such statutes are therefore themselves determinates. But they are very few compared with the statutes in general, and a still smaller number of such statutes are ever discussed in law. If they are so discussed, it certainly can be said of them that they are plain and unambiguous. But they may still be plain, though perhaps no longer unambiguous, if, being determinables, they are so nearly determinate that we can indicate almost at once all the ways in which they can become determinate. If there were a statute which provided that "when the President dies, the Vice-President shall at once *ipso facto* become President," it would be a determinable, because there might be an indefinite number of future presidents and vice-presidents, but it would be plain enough, because the number of cases is after all much smaller than in almost any other statutory determinable. It will

²² Johnson, *Logic* (1921) Pt. I, c. 11, at 173-86.

hardly be necessary to say that most of our most specific statutes fall considerably short of this ready determinability, and consequently no great limitation is imposed by the self-denying ordinance which renounces "interpretation" when the statute is plain. As a matter of fact, in most cases when courts say that a statute is plain and therefore needs no interpretation, they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation.

The act of interpretation, however, is not that of rendering a determinable quite determinate. The determinate involved is the actual issue in litigation. As soon as it is made apparent that the statutory determinable does or does not cover this determinate event, the act of interpretation is finished. It consists therefore in making a determinable somewhat more nearly determinate. Our inquiry must then turn to the methods by which this is done.

It has frequently been declared that the most approved method is to discover the intent of the legislator. Did the legislator in establishing this determinable have a series of pictures in mind, one of which was this particular determinate? On this transparent and absurd fiction it ought not to be necessary to dwell. * * * A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.

That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed. In an extreme case, it might be that we could learn all that was in the mind of the draftsman, or of a committee of half a dozen men who completely approved of every word. But when this draft is submitted to the legislature and at once accepted without a dissentient voice and without debate, what have we then learned of the intentions of the four or five hundred approvers? Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds

of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply. It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.

And if it were discoverable, it would be powerless to bind us. What gives the intention of the legislature obligating force? In theology or in literature, that question answers itself; but in law, the specific individuals who make up the legislature are men to whom a specialized function has been temporarily assigned. That function is not to impose their will even within limits on their fellow-citizens, but to "pass statutes," which is a fairly precise operation. That is, they make statements in general terms of undesirable and desirable situations, from which flow certain results. * * *

And once the words are out, recorded, engrossed, registered, proclaimed, inscribed in bronze, they in turn become instrumentalities which administrators and courts must use in performing their own specialized functions. The principal use is that of "interpretation." Interpretation is an act which requires an existing determinate event—the issue to be litigated—and obviously that determinate event can not exist until after the statute has come into force. To say that the intent of the legislature decides the interpretation is to say that the legislature interprets in advance by undertaking the impossibility of examining a determinable to see whether it can cover a situation which does not exist.

The courts in England and America have generally qualified the "golden rule" that intent governs the meaning of a statute, by saying that it must be the intent "as expressed in the statute." In that case, it would obviously be better to use the expression alone, without reference to the intent at all, since if the intent is not in the expression, it is nowhere. If the doctrine means anything, it means that, once the expression is before the court, the intent becomes irrelevant.

A legislative intent, undiscoverable in fact, irrelevant if it were discovered, is the last residuum of our "golden rule." It is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?

It may be that we shall fare better if we pursue the ordinarily hopeful course of examining history. As has been stated, this is the common practice in Continental countries, in which summaries of the legislative history of a statute are published with the statute itself. This is so much a matter of course that a different practice seems almost irrational. In England, a very different practice has prevailed, at least in recent times. The legis-

lative history of a statute is definitely excluded, even when adduced in support of an interpretation otherwise obtained. * * * In the United States, there is no general agreement. In interpreting the Constitution, the debates in convention are frequently resorted to, and in construing a great many statutes as well; but in other cases it is declared that the English rule will be adhered to.

As far as successive drafts of the statute and the debates in the legislature are concerned, the English rule has much to commend it. Successive drafts of a statute are not stages in its development. They are separate things of which we can only say that they followed each other in a definite sequence, and that one was not the other. But that fact gives us little information about the final form, since we never really know why one gave way to any other. There were doubtless many reasons, some of them likely enough to be personal, arbitrary, and capricious—the fondness of the draftsman for a special locution, his repugnance to another, a misconception of the associations of some word, a chance combination, and often enough a mere inadvertence. That is not to say that some conclusions, principally negative ones, can not be drawn from the legislative history of a statute. But in the end, all that we know is that the final form displaced the others, and that fact is not disputed.

The legislative history based on the “materials” does not therefore enable us to discover without more ado what determinate situations or events are included in the small or large group described by the statute. Technical devices have been resorted to, similar in theory to the processes by which, in mathematics or in the Aristotelian syllogism, propositions are reduced, simplified, transposed, and solved. Without examining the question whether these processes are abstractly applicable, it may be of interest to notice two such technical devices, both phrased in Latin and both widely employed. They are, *expressio unius est exclusio alterius*, and *ejusdem generis*.

The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word men. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true.

So far from being logical, as some courts have called it, it illustrates one of the most fatuously simple of logical fallacies, the “illicit major.”²³ * * *

²³ Cf. Jevons, *Elementary Lessons in Logic* (1918) 132.

It must be clear that the only value which such a maxim or axiom or rule could have would lie in the existence of an infallible or approximately infallible test of its applicability. Emphasis will help us in ordinary speech, but except for such inferred emphasis as the general purpose of the act will enable us to apply, no other stress on the words will be apparent in the printed page. The question will accordingly be in every case, not whether or not the expression of one thing excludes everything else, but whether we are to deny or affirm this rule in this particular case. We shall evidently deny it or affirm it for some other reason than its axiomatic force, and it will be necessary to search for that other reason.

The other rule, *ejusdem generis*, has a little greater foundation in logic and in ordinary habits of speech. But for that very reason it is of limited importance in discovering the determinates covered by the statute. There is no case in which the words "other" or "any other" are used and applied, in which the same result could not have been reached if these words were absent. And where the courts have found that the phrase "other" has the effect of enormously increasing the number of determinates, it is generally at the cost of making redundant all the previously enumerated ones. Thus we have the dilemma that when a long list of categories of things is supplemented by the phrase "and other," we may either omit these words or omit the preceding list. The rule of *ejusdem generis* would have some value in cases in which the doctrine of "strict construction" applied. But since this doctrine, as we shall see, is really no longer applied in any proper sense, those cases do not seriously qualify the considerations presented.

Our search for a method of finding a meaning in the statute will readily bring us to two which have at various times been employed or suggested, consideration of its purpose and consideration of its results. These are very different things, and any effort to combine them may lead to what was called * * * "methodological bigamy," in which the offspring of the one or the other union must necessarily be illegitimate.

If by the purpose of a statute we mean the actual purpose entertained by those who framed it or voted it, the purpose is indistinguishable from the intention, and we should have the same difficulty already noted, that this purpose is practically undiscoverable and would be irrelevant if discovered. But the purpose of many entities may be something far simpler and more apparent, something which is evident in the character of the thing itself, the end or final cause in the Aristotelian sense as distinguished from its efficient or its material cause. So, a razor is something to shave with, and we should know this without the least speculation as to the ideas which were in the manu-

facturer's mind when the razor was made. There are some objects the purpose or end of which we can not decide on so easily. Doubtless only a technical expert could tell from looking at one of many machine parts, what it was for, but in most concrete objects, the purpose is self-evident.

In the case of statutes also, it is rare indeed that we can not say positively what any particular statute is for, by reading it. A statute is quite generally a fairly specific statement. It asserts that something is to be done, and whatever uncertainty or vagueness or ambiguities may exist as to the conditions under which it should be done, as a rule there is none as to the situation which the conditions are to give rise to. A statute which declares gambling contracts to be void may need a deal of interpretation, but its obvious purpose is to discourage gambling.

But as a matter of fact, can we be quite sure about it? There are purposes and purposes. It is not so much that the same statute may be an obvious instrument to several ends simultaneously, which is, after all, unlikely, but that nearly every end is a means to another end. We distinguish in our conduct and our thinking between immediate and ulterior purposes. And in most cases we contemplate a final or ultimate purpose which is in all likelihood vague and remote enough but is certainly not to be disregarded.

If we then return to our gambling statute, can we say simply that its purpose is to discourage gambling? That is obviously a remoter purpose, but the immediate purpose is something less. It is to make it impossible to sue on gambling contracts, or at any rate to make their gambling character a defense. And it must be apparent that the immediate purpose will depend largely on the remoter purpose. Again, a statute making murder capital has as its immediate purpose the putting to death of murderers. But certainly a further purpose is to discourage murder. It may be said that its better and larger purpose is that its immediate one may never be effectuated.

When we recall that the avowed and ultimate purposes of all statutes, because of all law, are justice and security, we have an additional fact to keep in mind. Surely it is not open to us to say that these purposes are too remote to be regarded, and in some cases there are solemn constitutional declarations that they must be considered paramount. At all events, the long concatenation of means and ends leads to a final end or to a final group of ends, and if the immediately apparent or the "primary" purpose of a statute seems to point away from it, courts are quite properly and justly perturbed.

There could be no better example of all this than the Statute of Frauds. The original statute passed by Parliament in 1677 states its purpose in the very name. It is to prevent frauds and

perjuries. The means whereby this was to be achieved make up the immediate purpose of the statute. It was to make invalid to some extent many groups of oral contracts. There has probably never been a statute in which the immediate purpose has so frequently defeated the ulterior purpose as has been the case in this statute, and there is scarcely a group of these oral contracts in which the court has not struggled vigorously to prevent such a result. As a consequence, the number of determinate situations to which each of the larger determinables described by the statute might be reduced, has been constantly lessened, and this has surely gone on without much attention to those which the framers of the statute might have imagined.

In fact, we must qualify the statement that the immediate purpose of the statute is generally apparent. It is commonly rather the ulterior purposes which are apparent. Only when we have made up our minds what the ulterior purpose really was shall we know, for example, the immediate purpose of a statute which makes gambling contracts "void."

A contradiction between the primary and the ulterior purposes of the statute or the ultimate purpose of all statutes, will become apparent, if at all, only when we actually carry out or attempt to carry out the primary purpose. The method of "interpreting" a statute by its results is therefore an almost inevitable consequence of the existence of a chain of purposes in every piece of legislation. If courts tell us, and they often do, that the result is never to be considered, they are announcing a psychological impossibility.

The immediate result of interpreting a statute is plain enough. The given determinate situation is or is not to be treated as one of the reductions of the larger determinable which the statute describes. But that can not be the result which will tell us how to interpret a statute, because we find this result only after we have interpreted. What we mean therefore when we use a result as a method of interpreting statutes, is that we ask ourselves what remoter results will follow if this immediate one is effected. Courts are fond of pointing to the dangers incident to the interpretation they reject. It is curious that an apprehensive glance at disastrous future consequences is likely to be the mark of a court which considers itself conservative and which would repudiate as a radical and intolerable innovation a method in interpretation consciously based on results.

The method of results involves prophecy, which is in itself not a damning indictment. A certain amount of forecasting of probabilities is an essential element of human conduct; and there is no reason in the world to command judges not to indulge in it. Our difficulty lies in the skill with which the forecasting is done. When a court declares that a certain interpre-

tation will lead to undesirable consequences and is therefore to be avoided, the striking quality of this declaration is usually the grave doubt it elicits as to the accuracy of the forecast.

We may sum up by saying that to interpret a law by its purposes requires the court to select one of a concatenated sequence of purposes, and this choice is to be determined by motives which are usually suppressed. To interpret it by its results is to prophesy probable consequences for one or another of several interpretations, and the basis of the calculus is equally undisclosed. And yet these two types of interpretation are not merely the commonest in actual operation but are in most cases imperfectly concealed under so-called technical interpretations.

It will be seen that so far as purposes or results are concerned, courts act in the case of statutes as they act when no statute is in question. But the necessity of considering precise words points to an important difference when a statute is to be applied, and imposes certain limitations in the application. Whether words be the skin of an idea, in the simile of Mr. Justice Holmes, or chameleons which take their color from their surroundings, in the figure occasionally used by Continental jurists, the skin, we must remember, is already half filled; the chameleon's natural gray shines through the red or green which it has assumed from its surroundings. Although we are convinced that hanging a murderer has no deterrent effect whatever, or has even a slight stimulating effect, we can scarcely recast the obvious immediate purpose of a statute which makes murder capital. Our manipulation of other elements of the judicial process, the ascertainment of the facts, the application of certain kinds of procedure, the attempt at securing pardon or commutation, will be affected by our selection of an ulterior purpose here, but hardly the "interpretation" of the statute itself. That, as far as its immediate purpose is concerned, takes little color from its ultimate purposes or from its probable consequences. Similarly, the Statute of Frauds will permit of a considerable reduction of extension, but it is not possible to refuse to apply the statute in every case where there is hardship to the plaintiff or overreaching by the defendant. The immediate purpose after all is partially immutable, and a certain number of honestly made and just claims will be unenforceable, despite the fact that the announced purpose of the statute is to prevent only dishonest claims from being enforced.

Accordingly, the determinate situation posited by a statute has after all a maximum and a minimum of extension. These limits are either apparent to any intelligent person reading the statute or they will never be known at all, and the statute may be disregarded as completely meaningless and therefore useless. If we agree to call these limits the "plain meaning" of the statute,

there can be no quarrel with that designation. But the famous rule that interpretation is inadmissible under such a plain meaning does not follow at all, since there is ample room within these limits for a choice of purposes and a selection of determinates to effect them.

That almost any determinable situation posited by a statute is capable of expansion or contraction is recognized in the frequent differentiation between restrictive and liberal constructions. On the lips of opponents, the terms "strict" and "liberal" become changed to "rigid" and "loose," but they are obviously instances in which a small number of determinates is preferred to a great number, or *vice versa*. A strict construction is resorted to when it is desired to exclude a determinate which might readily enough be included within the statute. Liberal construction, as a rule, merely means that no such effort of exclusion will be made.

These tendencies are perfectly intelligible, and to know when a strict interpretation is to be applied and when it is not, would be of distinct value. Unfortunately the statements made on this question do not help us. When we read that laws enacted "in the interest of the public welfare or convenience," for the construction of works of great public utility, for the protection of human life or in regard to the rights of citizenship; for the prevention of fraud; or providing remedies against public or private wrongs, should be liberally construed, we are not aided much by an enumeration which includes almost every type of legislation that we can imagine, particularly when we are almost immediately referred to a case in which liberal construction is to be restricted to an attempt at effectuating only the "specified" purposes and objects of the statute. Similarly, the rule that remedial statutes are to be liberally construed has the qualification that this construction is never to be applied so as to extend the application of statutes to cases not within the contemplation of the legislature. The doctrine that statutes in derogation of the common law or common right, statutes conferring privileges, and all penal statutes are to be strictly construed would be a little clearer and easier to deal with if it were not so often disregarded, and if logically indistinguishable precedents were not present for the application and the rejection of the rule of strict construction in these cases.

Nevertheless, every process of interpreting statutes is ultimately a choice between a strict or a slightly less strict construction. A determinate that is sought to be brought within a statute is almost always capable of being included if the statutory determinable is made as inclusive as the limits indicated by the words will allow. The question is whether the limits will be extended to include this determinate or not. Strict or liberal

construction or interpretation is therefore the ordinary process of interpretation, *tout simple*. If in the cases where "strict" interpretation is said to be necessary, strict interpretation were taken to mean the least possible number of determinates, we should have a practicable, if unsatisfactory, rule. But it does not seem to mean this, and without a definite limit at which to stop and with a practice which frequently ignores the rule altogether, the terms lose most of their significance.

We are therefore still sadly to seek in attempting to discover on what basis a statutory determinate is made to stop just outside a particular determinate. The "plain meaning" of the statute offers us a large choice between a maximum and a minimum of extension. The "intent of the legislature" is a futile bit of fiction. The "purpose" requires a selection of one of many purposes. The "consequences" involve prophecy for which the courts are not particularly prepared, and in which, by any calculus of probabilities, several choices of results are open.

But since a choice implies motives, it is obvious that, somewhere, somehow, a judge is impelled to make his selection—not quite freely, as we have seen, but within generous limits as a rule—by those psychical elements which make him the kind of person that he is. That this is pure subjectivism and therefore an unfortunate situation is beside the point. It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing in his decision on statutory interpretation as on everything else. The most deplorable results of subjectivism need not be apprehended, since the tendency to follow precedents in statutory interpretations as well as elsewhere relieves the court of some of its burdens, and since judges are members of their several groups and, like all other citizens, exhibit more group traits than individual ones.

But it may well be said that the presence of so many confused, contradictory, and meaningless "theories" and "methods" of interpretation creates a turbid atmosphere about court, which is not conducive to clear thinking. The best we can say about it is that the sound sense of many judges will frequently penetrate this smoke screen and reach results that seem satisfactory, but it is often done half-consciously and almost surreptitiously.

Clarity would manifestly be secured by singleness of avowed method. If we must select one, it is hard to see how we can avoid selecting that method which is the commonest in practice, if the least announced. The statute—the *lex lata*—creates limits on both sides of strictness and liberality. Within them, any decision to interpret strictly—that is, any decision to exclude a particular determinate—might with advantage be consciously rendered, as is so often done semi-consciously or covertly, on the basis of its probable consequences. Judges will perhaps have

to seek special and expert guidance as to what those consequences will be—especially in those many cases in which a limited and highly specialized group of economic activities is involved.

When they have properly equipped themselves with the material competence necessary to make an intelligent conjecture of results, we shall doubtless find a considerable difficulty in making them desire one result rather than another. * * * When he discovers that the exclusion of a given determinate will have a certain effect, he must decide whether he wishes that effect. If the matter is one which is intimately connected with other elements of the social or economic order, it is worse than idle to profess that he will disregard the connection and select as a desirable consequence something which he does not wish to happen.

There would then be two questions of importance in the interpretative process. The first would be: Can the statutory determinable in the widest range be taken to include the determinate before the court? The more nearly determinate the statute is, the easier that question will be to answer. It is far easier to make a statute which contains large determinables than limited ones, but if we wish to see clearly and with brief consideration what the maximum and minimum of extension is, in any determinable, we must avoid words like "just" and "reasonable" and "property" and similar almost indefinitely extensible terms. These words have so little color of their own that they can be made to take almost any hue we desire.

The second question would be: Will the inclusion of this particular determinate in the statutory determinable lead to a desirable result? What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains. The dangers, whatever they are, which are involved in a Gefühls-jurisprudenz can in no system be completely avoided. An attempt to avoid them by declaring that judges must be guided by broad principles and not by particular situations is inevitably futile, because the broader the principle, the wider the scope of the personal predilections of the judge. If there is a glaring contradiction between what the judge thinks desirable and what the great majority of the community so considers, the community must, in its legislative function, limit as carefully as it can by more easily determinable categories the range within which the judge shall select his desirables. But the legislature can not both have its cake and eat it. It can not indulge itself in using large, round, sonorous words and then complain that courts do not treat them as precise, definite, and unreverberant.

* * *

Obviously we can not reasonably hope that a unified and

clear system of statutory interpretation by means of a competent calculus of probable consequences will be adopted in set terms. The murky terminology and the cardboard structures of technical devices are consecrated, and in all likelihood will need something like a juristic revolution to destroy. This fact will continue to be one of the chief sources of that unhealthy severance between legal thinking and any other thinking, which has already worked no inconsiderable mischief. On statutory interpretation, laymen feel themselves more nearly able to meet lawyers on equal terms than on questions of traditional legal principles. If judges refuse to discard such absurdities as *expressio unius*, if they will play fast and loose with "plain meanings" on which substantial judicial authorities can not themselves agree, if they will impute imaginary intentions to fictitious entities, if they will arbitrarily select purposes and equally arbitrarily forecast consequences, they can not hope to convince laymen that they are acting rationally or usefully. To act rationally and usefully and then to disguise the fact by a self-stultifying "technique" is unfortunately likely to be, in the future as it has been in the past, the only method by which lawyers and courts can deal with the statutes from which communities so naively expect an efficacy *ex opere operato*.

JAMES M. LANDIS, A NOTE ON "STATUTORY INTERPRETATION"²⁴

43 Harv. L. Rev. 886, 888-893 (1930)²⁵

The assumption that the meaning of a representative assembly attached to the words used in a particular statute is rarely discoverable, has little foundation in fact. The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence. To insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicated an intent on the part of the legislature, is to disregard the realities of legislative procedure. Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another. A particular determinate thus becomes the common possession of the majority of the legislature, and as such a real discoverable intent.

Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning. Successive drafts

²⁴ Reprinted with the permission of Harvard Law Review.

²⁵ The footnotes have been omitted.

of the same act do not simply succeed each other as isolated phenomena, but the substitution of one for another necessarily involves an element of choice often leaving little doubt as to the reasons governing such a choice. The voting down of an amendment or its acceptance upon the statement of its proponent again may disclose real evidence of intent. Changes made in the light of earlier statutes and their enforcement, acquiescence in a known administrative interpretation, the use of interpreted language borrowed from other sources, all give evidence of a real and not a fictitious intent, and should be deemed to govern questions of construction. The real difficulty is twofold; that strong judges prefer to override the intent of the legislature in order to make law according to their own views, and that barbaric rules of interpretation too often exclude the opportunity to get at legislative meaning in a realistic fashion. The latter, originating at a time when records of legislative assemblies were not in existence, deserve no adherence in these days of carefully kept journals, debates, and reports. Unfortunately they persist with that tenaciousness characteristic of outworn legal rules. Strong judges are always with us; no science of interpretation can ever hope to curb their propensities. But the effort should be to restrain their tendencies, not to give them free rein in the name of scientific jurisprudence.

When the intent or meaning of the legislature is discoverable, statutory interpretation posits no serious problem except the political one of insistence upon judicial humility. The real problems arise where the meaning of the legislature is not discoverable. Here the gravest sins are perpetrated in the name of the intent of the legislature. Judges are rarely willing to admit their role as actual lawgivers, and such admissions as are wrung from their unwilling lips lie in the field of common and not statute law. To condone in these instances the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man. No compromise can be had on this issue. But is the alternative *Gefühlsjurisprudenz* or, better, *Freigesetzfindung*?

A statute rarely stands alone. Back of Minerva was the brain of Jove, and behind Venus the spume of the ocean. So of the statute, it is the culmination often of long legislative processes, too rarely understood by the mere lawyer, and too rarely studied to have been lifted from the contempt bred of ignorance. Such material frequently affords a guide to the intent of the legislature conceived of in terms of purpose. To deal, for example, with the Trade Disputes Act of 1906 without regard to the fact that it followed upon a Liberal-Labor victory, would be

to thwart known legislative hopes and desires. It is done unquestionably. The mutilated Clayton Act bears ample testimony to the "day before yesterday" that judges insist is today. But this is simply the price we pay for judicial independence. To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time.

It must be insisted that the legislative purposes and aims are the important guideposts for statutory interpretation, not the desiderata of the judge. And there is a world of difference between an attitude of mind that honestly seeks to grasp these and give them effect, and one that cavalierly throws them overboard and leaves us to the mercy of the judge's "day before yesterday." The so-called rules of interpretation are not rules that automatically reach results, but ways of attuning the mind to a vision comparable to that possessed by the legislature. The vision of itself rarely actually grasps the particular determinate, but the eye once aligned in the same direction will more probably place a particular determinate in its appropriate spot. The despised rules of *expressio unius exclusio alterius*, presumptions of strict and liberal interpretation, are of this character. They predicate attitudes of mind more likely to recreate the atmosphere surrounding the statute in its passage and thus more likely to give effect accurately to the real legislative purpose. Like most "rules of law," they solve only the obvious case, and give a direction for profitable thinking about the difficult ones. And it is true of them, as of most "rules of law," that occasions will arise when they must be broken.

The use of extrinsic aids to statutory interpretation thus has real and not illusory significance. Hopeful developments toward a science of statutory interpretation must be in the direction of devising means of properly evaluating the effectiveness to be given such extrinsic aids. Of course, guessing will not thereby be eliminated; but what science, natural or otherwise, has eliminated the necessity for guesswork? Nevertheless the emphasis must lie upon the honest effort of courts to give effect to the legislature's aims, even though their perception be perforce through a glass darkly. There will and must remain that group of cases—smaller than is generally supposed—where no meaning, aim, or purpose of the legislature is at all capable of apperception. Here and here alone does talk of the intent of the legislature become meaningless and barbaric. And here society and the legislature both entrust themselves to the law-making powers of courts. No science of law has yet done away with the need for such occasional legislation; a science of statutory interpretation can hardly hope to fare better. But the in-

sistence of both must be that judicial legislation shall concern itself only with the interstitial tissues of the body politic and not its gristle.

WALTER WHEELER COOK, SCIENTIFIC METHOD AND THE LAW²⁶

13 American Bar Association Journal 308-309 (1927)

* * *

. . . If we approach the problems which confront the lawyer and the judge . . . what do we find? First of all, we discover that the practicing lawyer, as much as, let us say, an engineer or a doctor, is engaged in trying to forecast future events. What he wishes to know is, not how electrons, atoms, or bricks will behave in a given situation, but what a number of more or less elderly men who compose some court of last resort will do when confronted with the facts of his client's case. He knows how they or their predecessors have acted in the past in many more or less similar situations. He knows that if without reflection the given situation appears to them as not differing substantially from those previously dealt with, they will, as lawyers say, follow precedent. This past behavior of the judges can be described in terms of certain generalizations which we call rules and principles of law. If now the given situation appears to the court as new, i. e., as one which calls for reflective thinking, the lawyer ought to know, but usually does not because of his unscientific training, that his case is "new" because these rules and principles of law do not as yet cover the situation. If they did, the case would be disposed of more or less automatically. As it is, the lawyer finds competing analogies and so competing rules or principles which are possibly applicable. A familiarity with modern studies of human thinking would reveal to him that *his job is, not to find the pre-existing meaning of the terms in the rules and principles which he wishes the court to apply, but rather to induce the court to give to those terms for the first time a meaning which will reach the desired result.* (Emphasis supplied.)

If we shift our point of view from that of the practicing lawyer to that of the judge who has to decide a new case, the same type of logical problem presents itself. The case is by hypothesis new. This means that there is no compelling reason of pure logic which forces the judge to apply any one of the competing rules urged on him by opposing counsel. *His task is not to find the pre-existing but previously hidden meaning of the terms in these rules; it is to give them a meaning.* . . . (Emphasis supplied.)

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The logical situation confronting the judge in a new case being what it is, it is obvious that he must legislate, whether he will or no. By this is meant that since he is free so far as compelling logical reasons are concerned to choose which way to decide the case, his choice will turn out upon analysis to be based upon considerations of social or economic policy. An intelligent choice can be made only by estimating as far as that is possible the consequences of a decision one way or the other. To do this, however, the judge will need to know two things: (1) what social consequences or results are to be aimed at; and (2) how a decision one way or the other will affect the attainment of those results. This knowledge he will as a rule not have; to acquire it he will need to call upon the other social sciences, such as economics. Note now that our traditional technique makes no adequate provision whereby counsel can furnish the court with the needed data; neither does it provide the court itself with the machinery to acquire it. Why? I take it, because the assumption is that with nothing but his experience as a man and a judge he can by reasoning, by logic, decide the case—it is purely a question of law, and no evidence is required after the facts of the situation have been ascertained.

* * *

II

c. CASE MATERIALS

Introductory Note

Now that you have been exposed to the views of Messrs. Frankfurter, Cohen, Williams, Radin, Landis and Cook on what the problem of "ascertaining the meaning of ambiguous legislative language" involves, let us see whether these views will be of aid in understanding just how the problem is attacked in specific case studies. The following materials should be helpful in pointing out—to paraphrase Mr. Justice CARDOZO—various types of "equipment" that have been taken out of the "legal armory" and used by judges and lawyers in cases involving ambiguous legislative language—for example, the "canons" or "rules" of statutory construction, the various extrinsic aids to interpretation, etc. It will be helpful, for purposes of class discussion, (a) to isolate and extract each one of these various types of "equipment" as they are found in the cases and briefs which follow, (b) to ascertain just how each one fits into the overall scheme of argument—how each one pushes the "interpretation" to its "logical" conclusion, and (c) to evaluate their worthiness as weapons of advocacy. Take the case of *United States v. Lexington Mill & Elevator Co.*, which follows.

You will find at least seven types of "equipment" which was used in tackling the problem of "meaning"—(1) the so-called "plain-meaning rule," (2) the "rule" that "all the words used in the statute should be given their proper significance," (3) an analogy to similar English legislation, (4) remarks by a chairman of a Congressional Committee considering the legislation while it was yet in bill form, (5) Webster's Dictionary, (6) the theory that if Congress "had intended to enact the statute in . . . [a certain form] it would have done so by choice of apt words to express that intent," and (7) public policy. How are these pieces of "equipment" used? Are any of them vulnerable to attack? What is their relative value as weapons of persuasion?

It will also be helpful in your analysis of these materials to keep the following questions in mind?

1. How does the court determine whether legislative language is so "plain" as to avoid the necessity of resorting to legislative history and other extrinsic aids. How would you endeavor to counter an argument based on the "plain meaning rule" if it were advanced by your opponent.

2. What is the nature of the "ambiguities" in legislative language as they appear in the cases? Are there any instances in which "ambiguities" are created in order to prevent what the court deems undesirable from the standpoint of public policy?

3. Does the court "find the pre-existing but previously hidden meaning" of legislative language, or does it give the language a meaning? If the former, what are the methods and source materials, if the latter, what tools of advocacy are presumedly used to persuade the court to give the words one meaning instead of another?

4. Are the so-called "canons" or "rules" of construction which appear in the cases logical imperatives, "axioms of experience"—to use Mr. Justice HOLMES' phrase—, or merely convenient guises through which the inarticulate policy judgments of the interpreters are established? If logical imperatives, what are they; if "axioms of experience," where does one find them; if guises for policy judgments, how can the advocate best exploit them?

As you can gather from the preceding remarks, we will, for classroom purposes, be less concerned with *what* the courts hold in each of the following cases, than with *why* the courts so hold, and how they reached the results that they did. The *what* is merely a matter of what the courts concluded—a matter primarily of rote memory. It is the most permanent *why* and *how* that need to be isolated from the cases—for they constitute the methodology, the basic equipment which the lawyer must

transplant and use when confronted with an entirely new situation involving the "meaning" of ambiguous legislative language.

UNITED STATES v. LEXINGTON MILL & ELEVATOR CO.

Supreme Court of the United States, 1914
232 U. S. 399, 58 L. ed. 658, 34 S. Ct. 337

Mr. Justice DAY delivered the opinion of the court.

The petitioner, the United States of America, proceeding under § 10 of the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768, 771), by libel filed in the District Court of the United States for the Western District of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Missouri, and which remained in original, unbroken packages. The judgment of the District Court, upon verdict in favor of the government, was reversed by the Circuit Court of Appeals for the Eighth Circuit (202 Fed. Rep. 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process," so called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of § 7 of the act, namely, (1) in that the flour had been mixed, colored and stained in a manner whereby damage and inferiority were concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of § 7, and was misbranded; but the Government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of § 7, but in the view we take of the case as to the instruction of the court under subdivision 5 it need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned and judgment of condemnation entered. The case was taken to the Circuit Court of Appeals upon writ of error.

The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The Circuit Court of Appeals held that the testimony was insufficient to show that by the bleaching process the flour was so colored as to conceal inferiority, and was thereby adulterated, within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance, in any quantity, would adulterate the article, for the reason that "the possibility of injury to health due to the added ingredient, and in the quantity in which it is added, is plainly made an essential element of the prohibition." * * *

The case requires a construction of the Food and Drugs Act. Parts of the statute pertinent to this case are:

"Sec. 7. * * * That for the purposes of this act an article shall be deemed to be adulterated: . . .

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. . . .

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health. . . .

"Sec. 10. * * * That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct."

Without reciting the testimony in detail it is enough to say that for the Government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a

consumer. On these conflicting proofs the trial court was required to submit the case to the jury. The court,—after stating the claims of the parties, the Government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health—gave certain instructions to the jury. Part of the charge, excepted to by the respondent reads:

“The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour, or foodstuffs made by the use of it, would injure the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case.”

On the other hand, the respondent insisted that the law is, and requested the court to charge the jury:

“That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

“And in this connection you are further instructed that it is incumbent upon the government to prove that any such added poisonous or other added deleterious ingredients, if any, contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions, and amounts as may render said flour injurious to health; and unless you find that all of such facts are so proven you cannot find against the claimant, or condemn the flour in question under that charge in the libel; and if you fail to so find, your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

* * *

“The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the Government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that

such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour."

It is evident from the charge given and requests refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least, such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that, in order to prove adulteration, it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour, and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury, they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. ed. 1060, 9 S. Ct. 651:

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."
Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 20 S. Ct. 155:

"The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Furthermore, all the words used in the statute should be given

their proper signification and effect. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115, 25 L. ed. 782.

"We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in *Bacon's Abridgment*, § 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

Applying these well-known principles in considering this statute, we find that the fifth subdivision of § 7 provides that food shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended, the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to the health. Congress has here, in this statute, with its penalties and forfeitures, definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . . contingency or liability, or possibility or probability." In thus describing the offense, Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure

the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words, and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131) :

"As to the use of the term 'poisonous,' let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists, as to whether or not it is dangerous to take into the human system."

And such is the view of the English courts construing a similar statute. The English statute provides (§ 3, of the Sale of Food and Drugs Act, 1875) :

"No person shall mix, color, . . . or order or permit any other person to mix, color, . . . any article of food with any ingredient or material so as to render the article injurious to health."

That section was construed in *Hull v. Horsnell*, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. LORD ALVERSTONE, L. C. J., in reversing and remitting the case on appeal, said :

"In my opinion, if the justices convicted the appellant of an offence under § 3 of the Sale of Food and Drugs Act, 1875, on the ground that the ingredient mixed with the article of food was injurious to health,—that the sulphate of copper was injurious to health, and not on the ground that the peas, by reason of the addition of sulphate of copper, were rendered injurious to health, the conviction is clearly wrong. To constitute an offense under the latter part of § 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health."

We reach the conclusion that the Circuit Court of Appeals did not err in reversing the judgment of the District Court for error in its charge with reference to subdivision five of § 7.

The Circuit Court of Appeals reached the conclusion that

there was no substantial proof to warrant the conviction, under the fourth subdivision of § 7, that the flour was mixed, colored, and stained in a manner whereby damage and inferiority were concealed. As the case is to be retried to a jury, we say nothing more upon this point.

As to the objection on constitutional grounds, it is not contended that the statute, as construed by the Circuit Court of Appeals and this court, is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals, reversing the judgment of the District Court, must be affirmed, and the case remanded to the District Court for a new trial.

Affirmed.

UNITED STATES v. SHREVEPORT
GRAIN & ELEVATOR CO.

Supreme Court of the United States, 1932. 287 U. S. 77,
77 L. ed. 175, 53 S. Ct. 42

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The defendant (appellee) was charged by indictment, returned in the court below, with misbranding certain sacks, containing corn meal, an article of food, by labeling each of the sacks as containing a greater quantity by weight than in fact was contained therein, contrary to the provisions of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, U. S. C., Title 21, § 2, which make it unlawful to ship in interstate or foreign commerce any article of food or drugs which is adulterated or misbranded, within the meaning of the act. The penalty prescribed is a fine of \$200 for the first offense, and for each subsequent offense, not exceeding \$300, or imprisonment not exceeding one year, or both, in the discretion of the court. Section 8, as amended by the act of March 3, 1913, c. 117, 37 Stat. 732, provides that an article of food shall be deemed to be misbranded—

“Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.”

A motion to quash the indictment was interposed by the defendant upon the ground that the act of Congress relied on is unconstitutional, because (1) the offense is not defined with certainty and therefore the act violates the due process clause of the Fifth Amendment, and the requirement of the Sixth Amendment that the accused shall enjoy the right “to be informed of the nature and cause of the accusation;” and (2) it is in conflict

with Articles I, II, and III of the federal Constitution which separate the government into legislative, executive and judicial branches.

The court below sustained the motion and dismissed the proceedings. The case comes here by appeal under the provisions of § 238 of the Judicial Code, as amended by the Act of February 13, 1925. U. S. C., Title 28, § 345; U. S. C., Title 18, § 682.

First. The contention seems to be that the proviso makes it necessary to read § 8 as substantively prohibiting unreasonable variations in the weight, measure or numerical count of the quantity and contents of any package from that marked on the outside of the package; and that the test thereby indicated is so indefinite and uncertain that it fails to fix any ascertainable standard of guilt, or afford a valid definition of a crime. In support of the contention *United States v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298; *United States v. Brewer*, 139 U. S. 278, 35 L. ed. 190, 11 S. Ct. 538; *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. ed. 322, 46 S. Ct. 126, and other decisions of this Court are relied upon.

We are of opinion that the construction thus sought to be put upon the act cannot be sustained; and, therefore, other considerations aside, the cases cited do not apply. The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages, in accordance with § 3 thereof.²⁷ This construction avoids the doubt which otherwise might arise as to the constitutional point, and, therefore, is to be adopted if reasonably possible. *United States v. Standard Brewery*, 251 U. S. 210, 220, 64 L. ed. 229, 40 S. Ct. 139; *United States v. La Franca*, 282 U. S. 568, 574, 75 L. ed. 551, 51 S. Ct. 278. We find nothing in the terms of the act to require a division of the proviso so that the power of regulation will apply to the establishment of tolerances and exemptions, but not to reasonable variations. We think both are included. As to this there would be no room for doubt if it were not for the presence of a comma after the word "permitted," or the absence of one after the word "established." Inserting the latter, the proviso would read, "That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established, by rules and regulations . . ." Punctuation marks are no part of an act. To determine the intent of the law, the court,

²⁷ Sec. 3 provides that the Secretaries named "shall make uniform rules and regulations for carrying out the provisions of this act. . . ."

in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed. * * *

Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H. R. 850, 62d Cong., 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S. R. 1216, 62d Cong., 3d Sess., pp. 2-4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. * * * Like other extrinsic aids to construction their use is "to solve, but not to create an ambiguity." *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. ed. 219, 20 S. Ct. 155. Or, as stated in *United States v. Hartwell*, 6 Wall. 385, 396, "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." The same rule is recognized by the English courts. In *King v. Commissioners*, 5 A. & E. 804, 816, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was "never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense." * * *

Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances and *variations* [italics supplied] from the quantity of the contents marked on the package shall be allowed: . . ." Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress. If the meaning of the statutory words was doubtful, so as to call for a resort to extrinsic

aid in an effort to reach a proper construction of them, we should hesitate to accept the committee reports in preference to this contemporaneous and long continued practical construction of the act on the part of those charged with its administration. Such a construction, in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it. See, for example, *United States v. Johnston*, 124 U. S. 236, 253.

Second. The contention that the act contravenes the provisions of the Constitution with respect to the separation of the governmental powers is without merit. That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the "power to fill up the details" by prescribing administrative rules and regulations. That the authority conferred by the act now under review in this respect does not transcend the power of Congress is not open to reasonable dispute. The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe. The effect of the proviso is evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes. The proviso does not delegate legislative power but confers administrative functions entirely valid within principles established by numerous decisions of this court. * * *

Judgment reversed.

McKENZIE v. PEOPLES BAKING CO.

Supreme Court of South Carolina, 1944. 205 S. C. 149, 31 S. E. 2d 154

STUKES, Justice. This is an appeal from an order of nonsuit which was granted at the conclusion of plaintiff's testimony in the trial of the case in the Civil Court of Florence, in May, 1943, and the similar refusal of a motion for a new trial. The record contains only the order of the trial Judge thereabout and the exceptions. From the former it is gleaned that plaintiff purchased from a Lake City retailer a five-cent cake which was manufactured and sold by the defendant, and that when attempting to eat it, plaintiff's gums were cut by a sharp piece of steel which was embedded in the cake, resulting in pain and suffering from mouth injuries for which she sought damages.

Confirming nonsuit and refusing plaintiff's motion for a new trial, the Court filed a formal order, mentioned above, which

latter recited that there was no evidence of common law negligence in the manufacture of the cake and that the Pure Food Statute (section 5128 et seq. of the 1942 code) is not applicable because, it being penal in its nature and in derogation of the common law, it should be strictly construed and that the piece of steel was not an ingredient of the cake for it was not a component part; and it was held that the Legislature, by its enactment, did not intend the statute "to have any scope beyond a very strict meaning of its terms." * * *

There was error in applying a strict construction of the law which was a departure from the former decisions of this Court upon the subject, some involving food and some involving drinks. * * * The statute has a criminal side and if the defendant were resisting a prosecution for its violation, strict construction might be in order, the latter now unnecessary to decide. But careful reading of the rather lengthy law is convincing that its primary intention was the protection of the people of the State from impure and adulterated food, drug and drink, soft and strong. Such statutes are given generally in civil actions a fair and reasonable interpretation, perhaps properly designated "liberal," in order to effectuate the purpose of protecting the public from imposition, fraud, and negligence of food, drug and drink manufacturers, processors and vendors. * * *

It is by no means new in our law to hold that statutes of a double aspect (penal and remedial) may be given a liberal construction in the civil courts when applied remedially, and yet be strictly construed in the criminal courts, when one is prosecuted in the latter for a violation. * * *

Section 5128, volume 3, p. 249, of the Code of 1942, (our Pure Food Statute), provides that an article of food shall be deemed to be adulterated (b) (1) "if any substance or substances has or have been mixed with it so as to reduce or lower or injuriously affect its quality or strength," and again (7) "if it contains any added poisonous ingredient, or any ingredient which may render such article injurious to the health of the person consuming * * *."

The steel here was a substance mixed with the cake, a food, which "reduced or lowered or injuriously affected its quality," thus in literal violation of (1) above. Any other construction of the language would be a strained one, and would defeat the manifest intention of the Legislature in the enactment of the statute, which plainly was, as has been said, for the protection of the consumer.

Again, (7) is also applicable to the allegations in the instant case; the steel was an ingredient which rendered the cake "injurious to the health of the person consuming." The lower Court held that the steel was not an "ingredient" as that term is used

in this subsection (7), and that the latter contemplates only an ingredient in the sense of a component or intended part of the cake. But such contention might be made concerning some harmful drug accidentally or intentionally added to the usual components of cake, and yet the statute forbids the addition to a food of a "poisonous ingredient." A usual and intended ingredient is not apt to be "poisonous" or "injurious to health," so the contended construction would result in the practical elimination of all of this language from the Act, which cannot be said to be within a fair or reasonable interpretation of the language of the Legislature.

While the ordinary, dictionary definition of "ingredient" is that which enters into a compound, or is a component part of any combination or mixture, yet its literal meaning, derived from the Latin original is "to go into, to enter." And the definition of "component" found in Webster's New International Dictionary, Second Edition, Unabridged, 1939, contains the following helpful reference to the meaning: "Ingredient primarily suggests a mixture (such as a drink, a medicine) rather than a compound; as, 'The ingredients of our poisoned chalice' (Shak.). Similarly in its figurative uses it suggests something, which enters (see etym.) into a composition rather than an essential part; as, 'A little grain of romance is no ill ingredient to preserve and exalt the dignity of human nature' (Swift)."

That the Legislature did not intend "ingredient" in the restricted meaning found by the lower Court is seen by reference to subsection (3) of sec. 5128 (referring to food or drink) where that limited meaning is expressed by use of the word "constituent"; and in (c), relating to liquors but a part of the same section, where the words "substance" and "ingredient" are used interchangeably: "If it contains any substance or ingredient not normal or healthful," etc. It will hardly be said that bits of steel in "hard liquor" violate the pure food law but not so in the case of cake. But that would be the result of the lower Court's construction of an "ingredient" of a food to mean, in effect, a "constituent."

Pertinent also in this connection is the use of the word "added" in subsec. (7);—"any added poisonous ingredient," etc., implies clearly that the meaning of "ingredient" is not limited to "component part" or "constituent." See subsec. 3. The objectionable ingredient referred to is one "added," therefore not a component part or constituent, but yet an ingredient. The meaning intended clearly is a substance included in the product—here, steel in a cake—which is injurious.

The meaning of subsec. (7), just referred to, is clarified by amplification in sec. 5128-27(2), fifth, (III 1942 Code 261), as follows: "If it (food, here cake-interpolated) contain any

added poisonous or other added deleterious ingredient, which may render such article injurious to health," it is adulterated, expressly under this section of the law.

The inevitable conclusion from the foregoing analysis of the manifold provisions of the statute is that the inclusion of a harmful foreign substance in cake prepared for human consumption (food) is a violation of our Pure Food Statute. * * *

FISHBURNE and OXNER, JJ., concur.

BAKER, C. J., and TAYLOR, J., dissent.

BAKER, Chief Justice (dissenting)

It appears to me that the decision of this Court as reflected in the opinion of Mr. Justice STUKES will tend toward the creation of confusion in a field of law that is of great importance to manufacturers and to the consuming public alike. The precise question raised in this case has not heretofore been passed upon by us. Whatever the disposition of the present case may be, no doubt should be left as to the intent of the Court and as to the Court's conception of the meaning of the pertinent statutory provisions. Because I am convinced that the Court has reached the wrong conclusion, and has mistakenly based its conclusion upon an inapplicable case, I am constrained to dissent.

A very meagre record, in which neither pleadings nor testimony are set out, discloses to us this simple state of facts: The appellant purchased from a merchant a cake which had been baked by the respondent, and sold by the respondent to the merchant for resale at retail; in eating the cake, the appellant received a severe cut in her gums from a sharp piece of steel which was embedded therein, as the result of which she suffered much pain and sustained severe injuries to her gums and mouth. It is charged that the injuries were caused by the gross and wilful negligence of the respondent in stated particulars, none of which refer to any statutory provision.

At the trial of the case below, a motion for a direction of verdict in favor of the respondent was granted, upon the ground that the appellant had failed to prove negligence on the part of the respondent.

As far as the record discloses, the South Carolina pure food statute came into the picture only in the arguments before the trial Judge. He held that there was no evidence of common law negligence, and that no presumption of negligence arose under the statute merely upon proof of the presence of the foreign substance in the cake.

In the brief of the appellant it is admitted that unless the pure food statute applies, giving rise to a presumption of negligence from mere proof of the fact that the statute has been violated, the testimony offered on behalf of the appellant was not sufficient to send the case to the jury. The exceptions simi-

larly limit the problem before us to the single question whether the pure food statute is applicable, and if so, whether it has been violated.

The pure food statute is contained in Section 5124 et seq., of the Code. The provisions which are declared applicable in the majority opinion are that an article of food shall be deemed to be adulterated:

"If any substance or substances has or have been mixed with it so as to reduce or lower or injuriously affect its quality or strength." Sec. 5128(b) (1).

"If it contains any added poisonous ingredient, or any ingredient which may render such article injurious to the health of the person consuming: * * * " Sec. 5128(b) (7).

"If it contain any added poisonous or other added deleterious ingredient, which may render such article injurious to health: * * * " Sec. 5128-27(2); sub-div. Fifth.

The trial Judge expressed the view that the statute must receive a strict construction, "because it is not only a penal statute, but it is also in derogation of the principles of common law negligence." And the opinion to which this dissent is written states that this was error. The point is made that if the present case were a criminal case, a strict construction of the applicable statutory provisions might be called for, but that in a civil action the rule does not apply, and that the construction to be given the law must be one that is "fair and reasonable" or "liberal" to effectuate the purpose of the legislation.

* * *

On a proper state of facts, showing or implying responsibility on the part of the manufacturer for the presence of steel in the cake, due to negligence in the process of manufacture or in the handling and distribution of the product, the cases * * * show that liability existed at common law. But this common law liability had limitations which were deemed detrimental to the public interests, and for the purpose of expanding the field of liability in relation to the manufacture and sale of food, the statute was enacted to impose liability when ingredients of a product sold are poisonous or deleterious, so as to be injurious to health.

A piece of steel is not, under the facts of this case, a poisonous substance; nor is its presence in a cake an ingredient of the cake in any common or technical signification of the term. Neither can it be said that in the sense of a statute which deals with the introduction into food products of substances that impair their quality or strength, the word "mixed" can be held to apply to anything other than a substance which enters into the composition of the finished product. It is elementary that the words of a statute will not be expanded or distorted to encom-

pass a case outside of their scope, or outside of the meaning which in ordinary parlance the words must have meant to the legislative mind, and that is especially true in a case where to adopt the suggested broader construction is in effect to judicially legislate into the meaning of the words used an additional meaning which, if intended, normally would have been expressed in entirely different legislative terms.

Where, as in this State, liability under the statute can be predicated only upon the proof of the presence in the product of an ingredient which is poisonous or deleterious, or of a substance which reduces or lowers the quality or strength of the product, it is difficult to understand how the unexplained presence of a piece of steel in a bakery product can be said to be within the legislative contemplation.

To illustrate, baking powder or a sweetening element might in a given case prove to be poisonous or deleterious; it would be an "added poisonous ingredient" or a "deleterious ingredient" or a "substance" "mixed," not because it is a component part of the finished product as distinguished from a foreign substance unintentionally inserted or added, but because in the accepted sense of the word it is an "ingredient" or "substance" added to or "mixed" in the product. By a parity of reasoning, negligent manufacture or handling of a product which results in a state of facts such as is presented here involves the presence of an entirely foreign substance which does not come within the signification of the words "poisonous" or "deleterious to health," and presents a case no different in principle from one in which the injuries sustained arise out of negligence in permitting a product to be so wrapped and packaged that the handling of the article produces physical injuries.

The whole tenor and scope of the many provisions of the South Carolina pure food law emphasize the legislative purpose to protect the public against injuries to health resulting from either carelessness or wilfulness in the manufacture of food products in the field of "ingredients." The purpose and result are not to abolish common law rules of liability, but to introduce new fields of liability where any ingredient entering into the process of manufacture of a food product is of a character that may be described as poisonous or otherwise deleterious to health.

TAYLOR, J., concurs.

Note: Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908) will be helpful in explaining the reasons for the oft-repeated judicial view that "statutes in derogation of the common law should be strictly construed."

UNITED STATES v. 48 DOZEN PACKAGES, MORE OR
LESS, OF GAUZE BANDAGE LABELED IN PART
STERILIZED

Circuit Court of Appeals, Second Circuit, 1938. 94 F. 2d 641

CHASE, Circuit Judge.—The United States seized, and then filed its libel in the District Court for the Southern District of New York to have condemned and declared forfeited, forty-eight packages of plain gauze bandages under the provisions of the Pure Food and Drugs Act [of 1906] § 8, as amended, 37 Stat. 416, 732, 21 U.S.C.A. § 9. The appellant appeared as claimant and answered. On issue joined, the cause came on for trial by jury, but both parties moved for a directed verdict and then waived the jury. The court then made findings of fact and entered the judgment from which the claimant has appealed.

The findings of fact show that on or about May 19, 1936, the claimant shipped the packages of gauze bandages which were later seized and condemned from Bridgeport, Conn., to Parke, Davis & Co., in New York City. Except for samples which have been removed, all the gauze is now in the custody of the United States marshal for the Southern District of New York. The claimant is the owner.

The gauze was in small packages contained in larger cartons which were labeled, as were the small packages, to the effect that the gauze was sterilized. Each small package also bore a guarantee stating in part that "This Bay product has been scientifically prepared for surgical use under the most sanitary manufacturing conditions."

The gauze was not, however, sterilized or fit for surgical use, but did contain "living bacteria consisting of Gram-positive sporeforming bacilli and nonsporeforming bacilli, Gram-positive and Gram-negative bacilli, capable of growing aerobic conditions and anaerobic bacteria." And it was a substance intended for use in the cure, prevention, and mitigation of disease in man.

The turning point of decision on this appeal is whether such a substance as this gauze bandaging is within the scope of the Pure Food and Drugs Act and so subject to seizure and forfeiture. If it is within the act at all, it must fall within its purview as a "substance * * * intended to be used for the cure, mitigation, or prevention of disease of either man or other animals" defined to be a "drug" in Pure Food and Drugs Act § 6, 21 U.S.C.A. § 7. That it was, indeed, a substance is self-evident, and the above finding as to its intended use certainly brings it within the broad language of the statutory definition of a "drug." But it is argued that such broad definition must be held to be somewhat narrowed, under the principle of *eiusdem generis*, by words used in the statute in connection with it, and with that

contention we are fully in accord. The complete statutory definition of drug is as follows:

"The term 'drug,' as used in sections 1 to 15, inclusive, of this title, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals." Section 6 of the Act, 21 U. S. C. A. § 7.

But the application of the principle for which the claimant contends does not help its cause in this particular instance. Among those things recognized in the United States Pharmacopoeia as "preparations" are absorbent cotton and adhesive plaster made by spreading the adhesive on cotton cloth. But we need not place any emphasis upon adhesive plaster, however, for the recognition in the Pharmacopoeia of absorbent cotton, a substance generally similar in composition and use to a gauze bandage, sufficiently shows that the latter, while not itself recognized, is of a kind with what is. That makes it exactly the sort of thing Congress must have intended to include in the general language which was, of course, put there for the very purpose of making the statute cover more substances of the kind mentioned than were actually in the Pharmacopoeia or National Formulary.

The act was passed to prevent injury to the public health. *United States v. Lexington Mill & Elevator Co.*, 232 U. S. 399, 34 S. Ct. 337, 58 L. ed. 658, L. R. A. 1915B, 774. It should be given a fair and reasonable construction to attain its aim. These bandages, clearly intended for surgical use, are certainly a menace to the public health when misbranded to show that they were sterilized. They were not fit for the use for which their labels falsely represented them to have been prepared and so were subject to condemnation and forfeiture. *United States v. Ninety-five Barrels of Vinegar*, 265 U. S. 438, 44 S. Ct. 529, 68 L. ed. 1094.

Judgment affirmed.

UNITED STATES v. 75 CASES, MORE OR LESS, EACH
CONTAINING 24 JARS OF PEANUT BUTTER, ETC.

District Court, D. Maryland, 1944. 54 F. Supp. 641

COLEMAN, District Judge.—This suit involves four consolidated libel proceedings under the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. §§ 301-392, brought because of alleged adulteration of certain shipments of peanut butter.

The motion of claimant to impound certain evidence and documents, to return the seized merchandise, and to quash and dis-

miss the libels, to which the Government has filed exceptions, must be granted for the following reasons.

There are two questions in the case presented by the motion: first, whether the Government inspector acted within his authority and according to the requirements of the Act, as respects the inspection of claimants' plant on the dates in question; and, second, whether this same inspector likewise acted in accordance with the law in obtaining access to, and copying data from interstate shipping records of the claimant which form the basis for these proceedings.

On the first question, I must rule in favor of the Government. Section 374 of the Act provides for very broad inspection of the factory itself, "and all pertinent equipment, finished and unfinished materials, containers, and labeling therein," after first requesting and obtaining permission of the owner, operator or custodian of the factory to make such inspection. I find from the weight of the credible evidence that permission to do this was fully and freely given by claimant in the present case; that it is reasonable to assume that the results of such inspection might, without more, have led the Government to insist upon improvement within the plant, and that claimant might have inferred that such was a probable purpose implied in the inspection. Also, equally full permission was given to the inspector to take photographs in the plant, etc. Therefore, in doing so, the inspector did not go counter to the requirements of the law.

On the second point, however, I feel that, while the case may be said to be a borderline one, the somewhat peculiar facts require the court to rule in favor of the claimant.

Section 373 of the Act sets out, meticulously, the method by which records of interstate shipments shall be obtained "for the purpose of enforcing" the Act's provisions, which is that access to such records shall be afforded by the carrier upon the request of an officer or employee duly designated by the Administrator under the Act. That provision does not mean that the records may never be obtained in some other manner, i.e., direct from the shipper if he freely consents to disclose them, but I think it does mean that if the Government sees fit to bypass the prescribed method, then it must be very careful to make full disclosure to the factory owner as to the purpose in asking for the records. Clearly, the use of the words "all pertinent equipment" in Section 374 was not intended to include, for example, a firm's books of account or financial statements. A fortiori, it was not intended to include data of a firm's shipments, especially since the Section of the Act just preceding (Section 373) specifically provides how such data shall be obtained by the Government.

In the present case, I find from the weight of the credible evidence that there was no such full and complete disclosure by the

Government as it was required to make. It is true the president of the company testified,—and I think his testimony is characterized by complete frankness, as also is that of the Government inspector,—that he gave permission to the inspector to look at the records, but there is no evidence of any conversation on any occasion, or any discussion between the inspector and the president of the company or any one else connected with the company, as to the precise use to which disclosure of the records would be put. Yet the information so obtained was made the basis of these proceedings, and is the only basis for them. That smacks of surprise, if not of actual misrepresentation, and I do not think that is a permissible way for the Government to proceed. It should follow the strict provisions of the law. It should not so combine a factory inspection with an examination of the records as might,—and as, I find in the present case, did, in fact—mislead the factory owner or operator as to just what use the Government intended to make of the shipping data gleaned from these records. Possible damage to claimant's business reputation was likely to be involved in stoppage and seizure of its shipments in interstate movement,—far more damage than would normally be contemplated by imposing added sanitary requirements for manufacture of the product so shipped.

* * *

For the reasons given, I will sign an order granting the motion to impound and to return the evidence taken from the records of the claimant, which means a dismissal of the present proceeding, because it is based on information which I rule was improperly obtained. However, the shipments will be ordered to remain in the Marshal's custody for a period of fifteen days, pursuant to the Government's request, pending a determination by it as to whether or not to take an appeal.

I should add that my conclusion should not in any way hamper the Government or give any solace to the claimant if it be a fact that claimant has violated the law, because the Government still has a right to obtain from the carriers the records of interstate shipments; to bring new libel proceedings, or, in lieu of that, on the basis of what evidence they may already have from other sources, to bring, if they see fit to do so, an equity proceeding for the purpose of having further shipment in interstate commerce by the claimant restrained.

UNITED STATES v. 75 CASES, MORE OR LESS, EACH
CONTAINING 24 JARS OF PEANUT BUTTER, LABELED
IN PART (JARS): "TOP NOTCH BRAND," et al

Circuit Court of Appeals, Fourth Circuit 1944. 146 F. 2d 124

DOBIE, Circuit Judge.—This is an appeal from an order and judgment of the District Court impounding certain evidence

and documents, and dismissing five libels for condemnation, consolidated for trial, brought pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act, June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. A. § 301 et seq., hereinafter called the Act. The evidence and documents were impounded and the Government prohibited from using them and any information obtained therefrom, on the assumption that the evidence, documents and information were obtained by a government representative wrongfully and in violation of certain provisions of the Act. The opinion of the District Court is reported in 54 F. Supp. 641.

The Old Dominion Peanut Corporation (hereinafter referred to as claimant) is a corporation with its place of business in Norfolk, Virginia, engaged in manufacturing peanut butter and peanut candies. On or about October 15, 1943, one Rankin, an inspector for the Food and Drug Administration, went to claimant's plant for the purpose of making an inspection of the factory, under authority of Section 374 of the Act. He saw Stubbs, claimant's president, and revealed the purpose of his visit. Stubbs made no objection. An inspection of the factory was made and Rankin found rodent pellets and refuse in and around the food products. Chapman, claimant's plant superintendent, secured containers for Rankin and samples of the food products were taken.

After the completion of the factory inspection, Rankin asked to see the company invoices for the purpose of ascertaining where shipments of these food products were being made. Mizzell, the claimant's sales manager, produced the invoices for Rankin's inspection. No objection whatever was made by either Stubbs or Mizzell.

Subsequently, on November 1, 1943, Rankin returned to claimant's plant for another inspection. Stubbs gave Rankin permission to make the inspection and take photographs of insanitary conditions. The inspection again showed the presence of rodent pellets and refuse. Rankin photographed and took as evidence a dead mouse found in the candy manufacturing room. Rankin testified that he informed Worsham, claimant's secretary-treasurer, of the insanitary conditions and advised him that legal proceedings might result. Rankin again asked for permission to inspect claimant's invoices and this permission was once more granted, without objection. He made notations of claimant's interstate shipments. Later certain shipments of these food products were seized and, on analysis showing the presence of filth in the food products, the instant libels for condemnation were brought.

The District Court found, and we agree with this finding, that permission to inspect the factory was fully and freely given.

Further findings were made to the effect that permission was given to Rankin to inspect the claimant's invoices; but the District Court held that this permission was secured by a method that "smacks of surprise, if not of actual misrepresentation." This finding was predicated on the Court's interpretation of the requirements of Section 373 of the Act, and was, we think, clearly erroneous. Federal Rules of Civil Procedure, rule 52(a), 28 U. S. C. A., following section 723c.

Section 373 of the Act provides as follows: "For the purpose of enforcing the provisions of this chapter, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Administrator, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates."

The Court below has taken the position, that since Section 373 "meticulously" sets out the method by which information as to interstate shipments is to be obtained, should the Government choose to avail itself of any other method, it must make a full and complete disclosure to the claimant and make sure that claimant's consent is not due in any respect to a failure to understand the fullest use to which the records might be put by the Government.

While we agree that in no case should the Government be permitted to use fraudulent methods in obtaining evidence, we think that the District Court has here placed an unduly narrow construction on this statute. No such interpretation is warranted, either by the words of the Act, by its purpose, or by its legislative history.

Section 373 was enacted to provide a compulsory method by which information of interstate shipments, necessary to the enforcement of the Act, might be obtained from carriers. The need for such a method is obvious since interstate transportation is, in large part, done by common carriers. The lack of such a provision had proved a definite handicap to the enforcement of the Act. H. R. Report No. 2139-75th Cong. 3rd Session. But this section does not require that investigation must be limited to the records of the classes of persons therein enumerated.

Nothing in the legislative history of the Act indicates any such intent on the part of Congress.

Claimant contends here, as it did below, that since the Act provides that the records of carriers and receivers may be examined, this excludes the examination of the claimant's records. We agree with the District Court that the prescribing of certain compulsory methods of investigation does not exclude permissive investigation. The affidavit filed by Stubbs clearly shows the unfortunate result which would follow from a contrary view. The affiant there states that one of the interstate shipments involved was moved by the purchaser in his own truck. Such an instance reveals the difficulties confronted by those administering the Act, should permissive examination of the shipper's records be denied. In such cases there would be no common carrier's records to be examined. Such a view would clearly not be in conformity with the purposes of the Act.

We need not consider the question of claimant's rights had it refused to allow Rankin's inspection of its invoices. The District Court found that such permission was given. We think that claimant has no grounds for contending, nor the District Court for finding, that claimant was really misled. Claimant's officers well knew, or must have known, that, should the plant inspection justify the sampling of products shipped in interstate commerce, this would be done. Further, Stubbs admitted that he was "generally" familiar with the Act, and in the light of his experience he must have been aware, at least such knowledge is legally imputable to him, that should the sampling disclose filth, the products would certainly be subject to condemnation. This is the obvious and only practical inference to be drawn from these facts.

In connection with Section 373 of the Act, there is no ground for the application of the maxim *expressio unius est exclusio alterius*. We interpret this section, rather as affording a cumulative procedure to the Government, without restricting other avenues of information. Nor are we impressed by the statement of claimant's president (who, without any remonstrance or protest, gave Rankin free access to the invoices) that he would not have granted this access if he had not thought Rankin had a legal right to such access or if he had known that the information thereby gleaned might be used in subsequent libel proceedings. Permission to inspect the invoices was still voluntary and the Government was free to use this information in the proceedings for libel. See *Joong Sui Noon v. United States*, 8 Cir., 76 F. 2d 249, 251.

We are not here dealing with a criminal proceeding within the 4th Amendment to the Constitution. *United States v. 935 Cases, etc.*, 6 Cir., 1943, 136 F. 2d 523, certiorari denied, *Ladoga*

Canning Co. v. United States, 320 U. S. 778, 64 S. Ct. 92, 88 L. ed. 467. These libels for condemnation are proceedings in rem, and we agree with the Court below that there has been no violation of the "search and seizure" clause of the 4th Amendment. *United States v. 935 Cases etc.*, *supra*. Public interest demands such a construction as will further the purposes of the Act. *United States v. Research Laboratories*, 9 Cir., 126 F. 2d 42, certiorari denied, 317 U. S. 656, 63 S. Ct. 54, 87 L. ed. 528.

Claimant relies on *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746, in support of its contentions. Several factors impel the view that the *Boyd* case has no application here. That case involved an unconstitutional demand for the production of records in a criminal proceeding. If the records were not produced (in the *Boyd* case) the allegations were to stand as admitted. No such question arises here. By a specific proviso in Section 373 of the Act such information received may not be used in a criminal prosecution of the person giving the information. Nor was the plate glass involved in the *Boyd* case an out-law of interstate commerce. It was subject to forfeit only because of the illegal acts of its owner. Under the Act, condemned goods are subject to seizure and destruction irrespective of the intent of the manufacturer. *United States v. Buffalo Pharmacal Co.*, 2 Cir., 1942, 131 F. 2d 500.

Claimant further contends that it was improper for the inspector to combine a factory inspection and an examination of the claimant's invoices. It can hardly be assumed that the activities of the Food and Drug Administration are of a pigeon-hole nature which demand canalized separation. The Administration operates as a unit in furtherance of its primary purpose—the protection of the public. It is not unreasonable to assume that packaged food in which filth is found will be sold by the producer. Further, not only is it commensurate with the purpose of the Act to ascertain the interstate destination of the food in order to sample it for filth, should the factory inspection justify such action; but any other procedure would tend to frustrate the entire purpose of the Act. There was nothing wrongful in either the method of obtaining the information, or in the use of the information—voluntarily granted. *Joong Sui Noon v. United States*, *supra*.

There is no legal merit in the contention that the Administration must use other and more expensive and time consuming methods of investigation instead of using information voluntarily given. Nor do we find approval for claimant's position that had Rankin not received the information from its invoices, there would have been no means of tracing the adulterated food shipped in the purchaser's truck. The Administration is not in-

dulging in a game of "hide and seek." Its efforts are expended in the protection of the public.

Finally claimant contends that the taking of samples by Rankin was illegal. This, we think, is also without merit. Section 372(b) of the Act clearly contemplates the taking of samples.

The judgment of the District Court is reversed and the cause is remanded to that Court for further proceedings consistent with this opinion.

Reversed and remanded.

UNITED STATES v. KENT FOOD CORPORATION et al.

Circuit Court of Appeals, Second Circuit, 1948. 168 F. 2d 632

CLARK, Circuit Judge.—This appeal presents the question whether food condemned as adulterated in interstate commerce under the prohibition of the Federal Food, Drug, and Cosmetic Act, § 304, 21 U. S. C. A. § 334, may be released to the owners for export to another country. The district court, in an endeavor to conserve food available for human consumption and relying upon a provision of the Act exempting food products intended for export, § 801(d), 21 U. S. C. A. § 381(d), held in favor of the claimant owners. The United States has appealed, contending that such action is beyond the court's power.

Here two libels were filed on February 26, 1947, for the seizure and condemnation of two lots of tomato catsup shipped in interstate commerce in November, 1946. Kent Food Corp. claimed the 215 cases involved in the first libel. It also claimed 441 of the 902 cases attached in the second libel, while Clark-Iger Food Products Co., Inc., claimed the remaining 461 cases. Claimants without answering moved "for an order approving a consent" to a decree of condemnation entered on condition that an order be made directing the United States Marshal to release the catsup to the owners and permit them to sell it for export purposes only. The district court accepted the claimant's contention that the catsup was packed for export when it was seized, stating that the adulteration consisted of a high mold count, but that the goods were still fit for human consumption. Accordingly it entered a decree containing first an order of condemnation of the articles to the United States of America and then successive orders providing for their release by the Marshal to the claimants upon the filing of a bond conditioned in appropriate detail for the packing of the articles for export and shipment out of the country, in compliance with the provisions of 21 U. S. C. A. § 381 (d) and under the supervision of the Food and Drug Administration of the Federal Security Agency. Thereupon the United States moved for a reargument, pointing out, among other things, that the Kent Food Corp., had actually been sell-

ing the adulterated articles for domestic consumption. The court granted the reargument and it adhered to its original ruling, even though it now found "that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market." It held that it had power in its discretion to permit the export of the goods under proper restrictions and was not required to order them destroyed.

The appeal of the United States is based upon an asserted lack of power of the district court thus to dispose of condemned articles. In supporting its position, the Government also asserts that the court's holding has the effect of destroying the efficacy of the original order of condemnation, since it permits and encourages persons subject to the Act to gamble upon compliance, knowing that the penalty for violation will be only an order for sale in the export trade. The only power of the Government to condemn is statutory, and hence our problem is solely one of statutory construction.

Subdivision (a) of 21 U. S. C. A. § 334 makes liable to condemnation any article of food "that is adulterated or misbranded when introduced into or while in interstate commerce." Subdivision (d) of the same section provides for the disposition of condemned food by "destruction or sale" as the court may direct, with the direction that it shall not be sold contrary to the provisions of the Act or the laws of the jurisdiction in which it is sold, and with the further proviso that, upon the claimants paying the costs and executing a bond conditioned that the article shall not be sold or disposed of contrary to the provisions of the Act or the laws of any state or territory in which sold, "the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator." 21 U. S. C. A. § 342 (a) (3) states that a food shall be deemed to be adulterated "(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food."

In a separate chapter of the Act, dealing with imports and exports, it is provided that a food "intended for export shall not be deemed to be adulterated or misbranded under this chapter if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export." 21 U. S. C. A. § 381 (d). The section goes on to provide: "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter."

Thus the language of this last section deals with a subject matter entirely apart from that of condemnation under § 334. Here we have the statement of an exemption from the operation of the Act. Sec. 334 deals, however, with the consequences of a violation of the Act by introducing an adulterated article into interstate commerce; and subd. (d) sets forth sanctions and remedies for such violation. Thus the part of the section which deals with release to the owner expressly provides either for destruction of the article or for its being brought into compliance with the provisions of the Act. It is further made clear that the article is not to be sold contrary to the provisions either of the Act or the laws of the jurisdiction in which it is sold. There is no provision for a sanction by way of a delayed exemption for export purposes, such as might have been secured had the articles been originally intended for such purposes. The district court did not consider that these articles were being brought into compliance with the law; indeed, there was no basis for such a view. The court thought it had discretion to resort, even after the articles had been condemned, to the special exemption granted by the statute.

In this we think the court was in error. The power specifically given to the court to do only certain things upon condemnation of the articles excludes the possibility of according them a status they might originally have had, had they never been introduced into interstate commerce for the purpose of domestic sale. The clear purpose of the statute appears to be to visit the statutory penalties or sanctions upon articles thus found to be in violation of its provisions. See *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 58, 31 S. Ct. 364, 55 L. ed. 364; *United States v. Dotterweich*, 320 U. S. 277, 280, 64 S. Ct. 134, 88 L. ed. 48. The practical aspects of the situation would seem to support this construction, for there is nowhere disclosed an intention that a violator of the Act may avoid the consequences of his wrong by then exporting the outlawed goods to some foreign country which will receive them. However laudatory may be the purpose to conserve the food supply (perhaps even of a condiment or relish such as catsup), an attempt to rewrite the Act along these lines seems likely to have the effect of nullifying its chief purposes. The several provisions for extensive remedies of not merely seizure and condemnation, § 304, 21 U. S. C. A. § 334, but criminal prosecution and injunction, §§ 301-303, 21 U. S. C. A. §§ 331-333, also suggest the impropriety of the result reached below. * * *

Consequently we think that the provisions of the decree appealed from which go beyond the judgment of condemnation and provide for the release under the stated conditions of the articles to the claimants for export abroad are beyond the power of the

court. The libels must be remanded for the elimination of these provisions and for the substitution of provisions appropriate to the condemnation of the articles under 21 U. S. C. A. § 334(d).

Reversed and remanded

Quaere: How does this case "square" with *United States v. Lexington Mill & Elevator Co.*, *supra* p. 68, which gave currency to the view that: "Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

UNITED STATES v. 7 JUGS, ETC. OF DR. SALSBUURY'S RAKOS

District Court, D. Minnesota, 1944. 53 F. Supp. 746

JOYCE, District Judge.—These proceedings arose as a result of libels of information filed by the United States on June 1, 1942, against certain quantities of three articles of drug labeled in part "Dr. Salsbury's Rakos," "Dr. Salsbury's Phen-O-Sal," and "Dr. Salsbury's Can-Pho-Sal," charging that these articles were misbranded in violation of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 301, et seq. and subject to seizure and condemnation. A monition was issued and the United States Marshal pursuant thereto attached the articles in the possession of Boote's Hatcheries and Packing Company, Worthington, Minnesota, hereinafter called "the Hatcheries," where they had been shipped on various dates after January 1, 1942, by Dr. Salsbury's Laboratories, Charles City, Iowa, hereinafter called "the Laboratories." Thereafter the Laboratories intervened as claimant. As a result of preliminary proceedings, amended libels were filed by the United States. Each of the amended libels charged that the three articles were misbranded in violation of Section 502 (a) as a result of the association between the articles and five printed booklets. * * * These booklets, which are alleged to contain false and misleading representations concerning the effectiveness of the three articles in the treatment of specified diseases of poultry, were delivered to the Hatcheries by a sales representative of the Laboratories, and are alleged to have accompanied the articles in interstate commerce so as to constitute "labeling" as defined in Section 201 (m) (2) of the Act. Each of the libels has attached as exhibits such portions of these booklets as the government alleged were false and misleading. Answers filed by the claimant denied that the booklets constituted "labeling," denied that they contained false and misleading representations as to their effectiveness, and alleged that the three articles were not subject to seizure and condemnation under Section 304 (a) of the Act.

In order that the court might pass upon the questions of whether the booklets are "labeling" and whether the drugs are subject to seizure and condemnation, the parties stipulated the relevant facts. Claimant then moved to dismiss the libels upon the ground that the stipulation established that the articles of drug were not misbranded "when introduced into or while in interstate commerce" as required by Section 304 (a), and, therefore, this court had no jurisdiction over the subject matter of these proceedings. On September 13, 1943, an order was made denying this motion.

The three cases were consolidated for trial before a jury, and verdicts in favor of the United States were returned. The jury specially found that the three articles were misbranded. Appropriate decrees of condemnation and orders for destruction were submitted and approved. Claimant has now moved for new trials in each of the three cases and has assigned forty-five grounds of error.

* * *

From the stipulation it appears that the Laboratories is an Iowa corporation which distributes throughout the United States a line of poultry remedies designed for the prevention and treatment of diseases of poultry. Main offices are located at Charles City, Iowa, with branches at Columbus, Ohio, Fort Worth, Texas, and Kansas City, Missouri. Employing over 300 persons, the firm had sales in 1941 exceeding one million dollars. Distribution of its remedies is through hatcheries, drug stores, and feed and poultry houses, serviced by salesmen making regular calls.

One such salesman is Mr. A. F. Achilles, a resident of St. Paul, whose sales territory includes Worthington, Minnesota, where the Hatcheries are located. Since his employment on January 1, 1937, Achilles has made monthly calls on dealers in his territory in the solicitation of orders and rendering poultry services. Several times yearly, printed matter is shipped to Mr. Achilles by the Laboratories for distribution to his customers. In calling upon dealers, Achilles furnished them, "according to their needs and requirements and out of a supply carried in his car," with the type of booklets here involved. "Generally, Mr. Achilles, as part of his duties, on each of his regular calls on dealers, would determine whether sufficient quantities of the said booklets were on hand, and where the supply was low, it would be replenished out of supplies carried by him. Occasionally, a dealer, in order to maintain an adequate supply, would inform Mr. Achilles of his need for the said booklets without waiting for Mr. Achilles to check the quantity on hand." Where dealers desired replenishment of their stock of booklets prior to Achilles' monthly visit, request would be made upon the Laboratories, "sometimes in connection with an order for merchandise," and a supply

would either be delivered by Achilles or sent in small quantities from Charles City, Iowa. "During the spring and fall of each year as desired, a dealer would be provided by Mr. Achilles with window, counter, wall and floor display cards and posters."

It further appears from the stipulation that the quantities of the product Rakos here involved were shipped in interstate commerce from Charles City, Iowa, via railroad, on January 16 and April 11, 1942, and via truck express, on May 4, 1942, to the Hatcheries at Worthington, Minnesota. Prior to these times, the booklets here involved had been shipped and caused to be shipped in interstate commerce by the Laboratories to Achilles at St. Paul, Minnesota. These were delivered by Achilles to the Hatcheries on January 14, 1942, and April 29, 1942, "where they were prominently displayed together with, in immediate proximity to and in association with various articles of drugs manufactured and sold by Dr. Salsbury's Laboratories including specifically the articles of drug labeled in part 'Dr. Salsbury's Rakos' (including that quantity seized herein), 'Dr. Salsbury's Phen-O-Sal,' and 'Dr. Salsbury's Can-Pho-Sal,' and were available for reading and accessible for distribution with the sale, actual or potential, of these articles of drugs. The posters and display cards of the type herewith submitted as Exhibits A through E, which had been delivered by Mr. Achilles prior to the dates specified herein, were similarly displayed."

It is also stated that in addition to being displayed and available with the drugs, the booklets "are distributed by dealers * * * in over the counter transactions with purchases of one or more of the articles of drugs manufactured and sold by Dr. Salsbury's Laboratories including the articles of drug labeled in part, 'Dr. Salsbury's Rakos,' 'Dr. Salsbury's Phen-O-Sal,' and 'Dr. Salsbury's Can-Pho-Sal.' Also, a store patron may freely avail himself of one or more of the said booklets even though making no purchase." It is also agreed that the principal distribution of * * * several million [of one of the booklets] annually is by direct mailing to farmers throughout the United States at the request of dealers. These are mailed from Mount Morris, Illinois, where they are printed.

The following provisions of the Act are pertinent to claimant's contention. Section 502(a) defines misbranding as follows: "A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular." "Labeling" is defined by section 201(m) (2) to mean "all labels and other written printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." So far as applicable, Section 304(a) provides that "Any article of * * * drug * * * that is * * * misbranded when introduced into or while in interstate commerce * * *

shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found * * * ."

The specific contention made by claimant is that the stipulation establishes that while the quantities of Rakos here involved were shipped on January 16, April 11, and May 4, 1942, the booklets had been shipped to Achilles prior thereto, and were delivered to the Hatcheries on January 14, and April 29, 1942. Therefore, there is said to be a complete lack of identity as to times of shipment, times of arrival and routes travelled between the drugs and the booklets. Accordingly, it is argued, the drugs were not misbranded "when introduced into or while in interstate commerce" as required by Section 304 (a).

In passing upon this contention, of paramount importance is the fact that the Federal Food, Drug & Cosmetic Act is an enactment under the Commerce Clause. Accordingly, in construing its provisions, consideration should be given to the purposes of the Act, its history, the specific terminology used therein and the enforcement procedures adopted. * * * The history behind the present Act dates from 1906 when the Food and Drugs Act was adopted. 21 U. S. C. A. § 1 et seq. One of the most important enactments under the Commerce Clause, its purpose of protecting the public health and pocketbook against adulterated and misbranded foods and drugs, has led courts to declare with unanimity that food and drug legislation should be given a liberal construction in order to accomplish its remedial purposes. * * *

* * *

Inasmuch as Congress was dealing with what is regarded as illicit articles of commerce, it is not surprising that under the 1906 Act, the concept of misbranding was limited to the label or brand appearing upon the article or package. Accordingly, under Section 8 of the 1906 Act, 21 U. S. C. A. § 9, an article was misbranded if "the *package or label* * * * shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular." (Emphasis supplied) Any article so labeled was illicit in commerce. "The label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress." *McDermott v. Wisconsin*, 228 U. S. page 133, 33 S. Ct. 431, page 435, 57 L. ed. 754, 47 L. R. A., N. S. 984, Ann. Cas. 1915A, 39.

It soon became apparent, however, that this concept of misbranding was too narrow. Thus a manufacturer could make false claims on a circular enclosed in the package containing the article without misbranding it under the phraseology of Sec-

tion 8. * * * Congress in 1912 endeavored to correct this deficiency by passing the Sherley Amendment which defined as misbranded any article whose "package or label shall *bear or contain* any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." (Emphasis supplied) 21 U. S. C. A. § 10, Third. The attack upon the constitutionality of this amendment was considered in *Seven Cases v. United States*, 239 U. S. 510, 36 S. Ct. 190, 60 L. ed. 411, L. R. A. 1916D, 164. The Supreme Court decided that circulars bearing false and fraudulent therapeutic claims enclosed within the package containing the article would now misbrand it. Just as the label, under the 1906 Act, conferred upon the article its illicit character in commerce, so now the circular under the 1912 amendment provided this status. "The false and fraudulent statement * * * in the package * * * gives to the article its character in interstate commerce." 239 U. S. 517, 36 S. Ct. 193.

So prior to 1938, the law protected the public only where false claims were made on the label or package or in a circular within the package. Accordingly, to avoid the jurisdiction of the Food and Drug Administration, a patent medicine manufacturer needed only to separate physically the printed matter bearing the false claims from the article itself. This and other deficiencies of the old Act resulted in its complete overhauling by Congress and culminated in the enactment in 1938 of the present Act. The avowed objective of the new Act was to strengthen the protection afforded the public by eliminating the loopholes and expanding consumer protection. Cong. Rec. 73rd Cong. 2nd session, Vol. 78, Part 5, pp. 4567-4573. Many new provisions were added and old ones enlarged. The concept of misbranding was expanded to include any drug whose "labeling" is false or misleading. "Labeling" comprehends labels, container wrappers, and all written, printed and graphic matter which accompanies any article of food or drug. Enforcement procedures were expanded by the inclusion of new prohibited acts and injunctive relief. See Section 301, 303. The seizure and condemnation provisions were modified to eliminate obstacles to effectiveness and their availability was enlarged. Compare Section 10, 1906 Act, 21 U. S. C. A. § 14 with Section 304 (a), 1938 Act.

It is perfectly clear that to resolve the present controversy it is necessary to consider the interrelation of Sections 201(m) (2) defining labeling, 502(a) defining misbranding, and 304(a) providing for seizure and condemnation. Unless an article of drug is misbranded when it enters or while in interstate commerce, seizure is unavailable. There is no misbranding unless its labeling is false or misleading. Printed matter is labeling and will misbrand if it appears on the article, in the package

or accompanies the article and is false or misleading in any particular.

Realizing that Congress was attempting to expand the protection given consumers in redefining the concept of misbranding, it is evident that the word "accompany" should be given an interpretation which accords with the Congressional purpose. There is evidence in the legislative history of the labeling section indicating that broad coverage was intended. Thus in addressing the Senate committee in regard to this section, W. G. Campbell, Commissioner of the Food and Drug Administration, stated: "The term 'labeling' is defined so as to include not only the label but all circulars and material and placards for display purposes and the like that may in any form whatever accompany the article of food, drug or cosmetic. * * *" United States Senate Report 1944, 73rd Cong. 2nd Session, p. 16. There is nothing elsewhere in the history which in any way indicated that anything less than that was intended.

The narrow question here is the extent to which printed matter must "accompany" articles of drug at the time of introduction into or while in interstate commerce in order that such articles can be said to be "misbranded" within the meaning of Section 304 (a). In answer to this question, the government states that the old physical contiguity test of misbranding operative under the old law has been discarded and the present act should be given the broadest possible interpretation in accomplishing the consumer protection intended by Congress. Claimant states that it does not believe that physical annexation between the drug and printed matter is always necessary, but insists that because there are differences in times of shipment, times of delivery and routes travelled, the drugs here seized could not possibly have been "misbranded" at any time in their interstate journey.

The provision in Section 304 (a) that an article to be subject to seizure must have been "misbranded" during its interstate journey is the counterpart in the present Act of the theory and terminology of Section 10 of the old Act, 21 U. S. C. A. § 14. Thereunder, seizure was available as to any "article of * * * drug * * * that is * * * misbranded * * * and is being transported from one State * * * to another * * * ." Since the concept of misbranding was then limited to printed matter physically contiguous with the article, necessarily there was an actual physical misbranding throughout the interstate journey. However, as we have seen, the concept of misbranding has now been extended by Congress beyond this restricted notion of physical contiguity. Since Congress should not be thought to have expanded the substance without expanding the remedy, in asking whether an article is "misbranded" in

commerce as required by Section 304(a), we must necessarily apply the enlarged concept which the law has now created. The full scope of the present concept of misbranding must be applied in the interpretation of section 304 (a). As we have seen, Congress was dealing in this legislation with articles which were regarded as illicit. Accordingly, just as it was the label in 1906 and the circular in 1912 which conferred upon an article its misbranded status in commerce, so now under the present Act, printed matter which can be said to have accompanied an article confers its misbranded status in commerce.

Aside from the theory of the food and drug legislation, it is manifest that misbranding has true significance only in terms of the consumer. It matters little whether a farmer goes to Boote's Hatcheries and sees a large display card proclaiming the benefits of Rakos in the treatment of coccidiosis, or finds the same matter actually upon the carton or label of the product. If such representations are false, he is as much defrauded irrespective of the location of the printed statement. Nor does it matter to the farmer whether the booklets were physically side by side with bottles of Rakos during the interstate journey, or were delivered by a salesman. When the farmer enters a dealer's store, he finds the Rakos and the booklets together in one indivisible merchandising unit. Nothing on the bottle of Rakos, or on or in the carton in which it is sold tells the farmer that Rakos shall be used in the treatment of coccidiosis. The only statements to that effect are found in booklets displayed and distributed with Rakos and upon placards and wall posters prominently arranged in the store. The fact that the farmer has suffered an out-of-pocket loss by relying upon these representations should not be obscured by any subtle inquiries concerning whether the printed representations rode with the drugs on the same train, at the same time or over the same route.

* * *

In essence the question is: Must there be physical accompaniment throughout the entire interstate movement of the drugs in order for seizure and condemnation to be available? The question is answered in the negative. So to hold would be to resurrect the physical proximity theory of misbranding. May not an article be "misbranded" in commerce within the meaning of Section 304 (a) by printed matter which, though not physically contiguous thereto, nevertheless actually did "accompany" the article for all practical purposes and in all significant aspects? This question is answered in the affirmative.

The answer to these questions was first made in *United States v. Research Laboratories*, 9 Cir., 1942, 126 F. 2d 42, 45, where the libel, which the lower court dismissed, alleged that the circulars accompanied the articles in commerce by having the same

origin and in simultaneously arriving with the articles at destination where they were placed in the same room in the consignee's warehouse. In reversing the lower court, the court said: "The libel does not state, nor is it material, whether the packages and the circulars did or did not travel in the same crate, carton or other container or on the same train, truck or other vehicle during their interstate journey. The packages and the circulars had a common origin and a common destination and arrived at their destination simultaneously. *Clearly, therefore, they accompanied each other, regardless of whether, physically, they were together or apart during their journey.*" (Emphasis supplied.) The principle of that case, in rejecting the concept of physical contiguity as a test for misbranding under Section 304 (a), in my opinion is sound. Once this principle is comprehended, it is simply a question of determining in a given case whether the relationship between the article and the printed matter is sufficiently proximate to fulfill the requirement of accompaniment.

The word "accompany" as used in Section 201 (m) (2) was said in *United States v. Lee*, 7 Cir., 1942, 131 F. 2d 464, 466, 143 A. L. R. 1451, to mean: "The word 'accompany' is not defined in the Act, but we observe that among the meanings attributed to the word are 'to go along with,' 'to go with or attend as a companion or associate,' and 'to occur in association with,' Webster's New International Dictionary, 2d Ed." Naturally, meanings of accompany will vary in connection with the subject matter. "Accompany" as used in this Act is used to describe a relationship between an article of drug and its labeling. Since there "can be no question that among the usual characteristics of labeling is that of informing a purchaser of the uses of an article to which the labeling relates" (*United States v. Lee*, 131 F. 2d at page 466), the booklets here involved should be scrutinized from this viewpoint. In the sense just stated, if the booklets are not labeling, then the products Rakos, Phen-O-Sal and Can-Pho-Sal have none.

The stipulation clearly shows that the printed matter and the drugs had a common origin. They had a common destination in that both were intended to come together in the stores of dealers in Achilles' territory. They were interlocking units of a distributional scheme the objective of which was ultimate association and distribution together. There was actual, physical association together in the stores of dealers and actual distribution together in connection with purchases by farmers. It is fair to conclude that these booklets were prepared, shipped and distributed to dealers with the ultimate expectation and intention on the part of the Laboratories that they would serve the purpose of labeling for the three articles of merchandise here in-

volved. Without the booklets, the products themselves lacked labeling, at least in so far as informing purchasers of the purposes and uses of the remedies. The mere fact that the products were shipped at a different time, over a different route and were received at a different time from the booklets should not be permitted to confuse or obscure the substance of the matter. The instant that the product Rakos entered the channels of commerce enroute to the Hatcheries, it was to all intents and purposes as much travelling in accompaniment of the representations contained in the booklets as if those booklets were actually enclosed in the same shipping container. It is unquestionable that both the drugs and the booklets used the facilities of interstate commerce to accomplish a defrauding of the public. For this transgression, the products are subject to seizure and condemnation.

Were not the factors just stated to be given primary consideration, there would be a multiplication of refinements. Starting with the case of a circular in the package or in the shipping carton containing the drug, there would be a question as to circulars in a different car on the same train, or a different train, at a different time, over a different route, or by a different type of carrier. The physical aspects of the transportation are not important. What is vital here are such factors as interdependence of the drug and the booklets, common origin, common destination, display, distribution and use together. These determine whether there has been that degree of accompaniment which provides the necessary "misbranded" status under Section 304 (a). The mere fortuitous circumstance of an absence of physical association between the booklets and drugs during the interstate journey of the drugs does not in my opinion control.

Claimant insists, however, that there is no occasion for employing seizure and condemnation in this situation as the Government has a right to proceed by injunction under Section 301 (k). Claimant states that this section authorizes the Government to enjoin the Laboratories from causing an association between the printed matter and the drugs at the retailer's place of business. *United States v. Lee*, supra. The Government, however, does not concede that this section is necessarily available here and suggests several arguments which claimant might have made as to the nonapplicability of Section 301 (k) had the Government attempted to use it.

This court does not in this proceeding propose to mark out the limits of Section 301 (k). Seemingly, however, it was enacted by Congress under its authority to regulate activities affecting interstate commerce. * * * In referring to alteration, mutilation, destruction, obliteration or removal of labels this section at least suggests the possibility that what it contemplates is a lawful use by a drug of the facilities of interstate commerce

followed by some activity which causes it to be misbranded. In the instant case, drugs and booklets were flowing through commerce in a relationship which has been found to make illegal the use by the drugs of the facilities of commerce. In any event, in absence of further clarification, it cannot be said that the applicability of Section 301 (k) to the facts set forth in the stipulation is so clear that doubts should be entertained as to the applicability of Section 304 (a).

The ground of error most vigorously asserted by claimant in its motion goes to the failure of the court to grant certain requested instructions. Requests 3 and 4 were as follows:

"The law under which this proceeding is instituted does not contemplate that statements with reference to the curative or therapeutic value of the drugs shall be deemed false or misleading with respect to matters as to which there is an honest difference of opinions between schools and practitioners."

"In the treatment of diseases of animals honest differences of opinion may arise between schools and practitioners as to the therapeutic or curative value of drugs. Statements with reference to the curative value of drugs or helpfulness in assisting in bringing about a cure are not to be deemed false and misleading merely because differences of opinion exists between different groups of Veterinarians, or different groups skilled in this particular line of endeavor as to the curative value."

Failure to grant these requests is said to have constituted unconstitutional application of Section 502 (a), for the reason that it permitted the jury to find claims of effectiveness to be false and misleading upon the basis of differences of expert opinion. Failure to charge as requested is said to have permitted the jury to weigh differences of expert opinion and to decide whether the claims of effectiveness made by claimant were false or misleading depending upon whether it followed the experts for the Government or those for claimant. This, it is said, introduced such uncertainty into Section 502 (a) as would make it void for uncertainty. * * *

The law under which these proceedings were instituted provides that a drug is misbranded if its labeling is false or misleading in any particular. There is nothing in this standard which is vague or indefinite. It prescribes a rule of conduct by which persons can measure their acts. In and of itself there is and can be no contention that the provisions of Section 502 (a) are void for indefiniteness and uncertainty. * * *

Claimant, however, supports its contention that the standard is uncertain and indefinite by adding another element—the difference of opinion between the experts appearing for the Government and those appearing for claimant. It is said that the question of "whether or not these remedies are of value in the

treatment of poultry diseases involves a question of opinion and not a strict question of fact." Therefore, it is concluded, refusal to charge the jury as requested in 3 and 4 placed an unconstitutional interpretation upon Sec. 502 (a) by allowing the jury to find the claims of effectiveness false or misleading by deciding between two groups expressing different opinions about the effectiveness of these remedies.

Implicitly, the argument for claimant proceeds upon the assumption that it would be beyond the power of Congress to permit a claim of effectiveness to be found false by a jury where medical or veterinary opinion is divided on the matter. Whatever the merit of this assumption, it is clear that Congress has not attempted to do this in Section 502 (a), nor did it do so in prior legislation. What Congress has done is to permit a claim of effectiveness to be found false or misleading where the question of effectiveness is demonstrable as a fact. I do not think that I have permitted more in these proceedings.

The law in regard to the effect of a difference of medical opinion upon a proceeding in which a claim of effectiveness is sought to be proved false stems from *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90. In that case, the Postmaster General upon the basis of evidence satisfactory to him, issued a fraud order upon the ground that the Magnetic Healing School was using the mails to obtain money by means of false and fraudulent pretenses. An injunction was sought to restrain the Postmaster from carrying out the terms of the fraud order. A demurrer to the bill was sustained in the lower court and reversed on appeal. Laying constitutional consideration to one side, the Supreme Court held that the School's claims of effectiveness for its method of treatment of diseases, as to which there was a difference of medical opinion, could not be condemned as false for the reason that, being based upon differences of opinion, there was no standard of fact or truth by which to measure the falsity of the claims. The court stated that efficacy of treatment was a matter of opinion entirely and not a matter of absolute fact capable of proof as a fact. Under the statute, the Postmaster General was said to have no authority to decide between the conflicting opinions. The court held that where variant opinions appear as to claims of effectiveness, such a statute does not apply as a matter of law.

Later cases made the *McAnnulty* rule applicable to food and drug legislation under which statements constituted misbranding where false or misleading in any particular (1906 Act), or false and fraudulent (1912 Amendment), as applied to curative claims. *United States v. Johnson*, 221 U. S. 488, 31 S. Ct. 627, 55 L. ed. 823; *Seven Cases v. United States*, 239 U. S. 510, 36 S. Ct. 190, 60 L. ed. 411, L. R. A. 1916D, 164. Although the ma-

jority of the court in the Johnson case believed that Section 8 of the 1906 Act, 21 U. S. C. A. § 9, in declaring as misbranded statements which were false or misleading applied only to statements of strength, identity, quality and purity and did not apply to claims of curative value, and intimated that Congress was unlikely to distort its constitutional power to establish criteria in regions where opinion is wide apart, yet it is significant that the decision does not rest upon a constitutional basis. It was simply decided that Section 8 was not intended to apply to expressions of curative value. Following this decision, Congress amended the 1906 Act expressly to provide that statements of curative value would constitute misbranding if "false and fraudulent." 21 U. S. C. A. § 10, Third. When the constitutionality of this amendment was attacked upon the same ground as claimant advances here, a unanimous court in *Seven Cases v. United States* held that the amendment was intended to apply not to expressions of opinion but only to expressions of effectiveness which were plainly contrary to fact.

Although the court in the McAnnulty case had said that assertions of effectiveness were always matters of opinion because "There is no exact standard of absolute truth by which to prove the assertion false and a fraud * * * [since] * * * the claim * * * cannot be the subject of proof as of an ordinary fact," 187 U. S. 104, 23 S. Ct. 37, 47 L. ed. 90, the court now states that there is a category of assertions which fall outside the field of opinion and into the field of fact. "Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. * * * Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods." *Seven Cases v. United States*, 239 U. S. page 517, 36 S. Ct. page 193, 60 L. ed. 411, L. R. A. 1916D, 164. In view of the fact that Justice Hughes, who spoke for a unanimous court in *Seven Cases v. United States*, dissented from the majority opinion in the Johnson case as to the scope of Section 8 of the 1906 Act, the language which he used in his dissent is of significance upon this question. He stated: "It is, of course, true, that when Congress used the words 'false or misleading statement,' it referred to a well defined category in the law, and must be taken to have intended statements of fact, and not mere expressions of opinion. * * * But, granting the widest domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers." 221 U. S. page 504, 31 S. Ct. 630, 55 L. ed. 823. In using this language, Justice Hughes

was referring to terminology in the 1906 Act which is in all respects identical with that contained in Section 502 (a).

Plainly, therefore, the subject of regulation in the 1938 Act, as in its predecessors, is matter of fact, not matter of opinion. See House Committee Report No. 2139, 75th Congress, 3d Session. Except as affected by Section 201 (n) and the regulations issued thereunder, it is clear that food and drug legislation was intended to apply only to false or misleading expressions of fact. It seems manifest that the question of whether a remedy is effective is always a question of fact. A remedy cannot be both effective and ineffective under identical circumstances. The susceptibility of effectiveness to proof as a fact necessarily determines whether assertions can be adjudged false or misleading within the meaning of Section 502 (a). Necessarily, therefore, whether in a given case the question of effectiveness is one of opinion or fact depends entirely upon the evidence which is introduced.

* * *

In light of these considerations, it appears that the claims of unconstitutionality made by claimant as to the interpretation given to Section 502(a) in the charge are not well taken. The only situation where claimant could possibly say that its claimed constitutional rights had been invaded would be where a court had permitted the jury to find a claim of effectiveness false on the basis of evidence which indicated only a contrariety of opinion. No possible question of constitutionality can arise in a case where the evidence upon which the question of effectiveness was decided by the jury has the necessary factual basis. Such factual proof was present at the time these cases were submitted to the jury.

* * *

URBETEIT v. UNITED STATES

Circuit Court of Appeals, Fifth Circuit, 1947. 164 F. 2d 245

SIBLEY, Circuit Judge. Under the Food, Drug, and Cosmetics Act of 1938, § 304, 21 U. S. C. A. § 334, 16 electrical machines or devices were seized for condemnation in Ohio as having been misbranded when shipped in interstate commerce from Tampa, Florida, by appellant Fred Urbeteit to J. J. H. Kelsch at Cincinnati. The misbranding was alleged to consist in printed matter which accompanied them while in interstate commerce which was false and misleading in that it represented the machines as having therapeutic value in the diagnosis and treatment of stated diseases of man, whereas the devices were not effective for such purposes. Kelsch claimed 6 of them as his, and Urbeteit claimed 10 of them as belonging to himself but rented to Kelsch. After trial, the case by consent having been transferred to

Florida, a judgment of condemnation and destruction was rendered, with recovery of some \$1,150.64 costs. Urbeteit appeals.

The claims admit that 6 machines were sold by Urbeteit to Kelsch and shipped in interstate commerce as alleged, and that the 10 others were rented and shipped to Kelsch by express, and that the printed matter was at the request of Kelsch sent by Urbeteit to Kelsch by parcel post; but deny that it was a labeling of the machines or accompanied them, and deny that its statements are false and misleading. The testimony, in great volume, related mostly to the falsity of the statements. We consider first, however, whether there was a misbranding proven under the Act.

Section 301 (a, c), 21 U. S. C. A. § 331 (a, c), prohibits the introduction into and the receipt in interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded, and Section 304 (a), 21 U. S. C. A. § 334 (a), provides for seizure and condemnation of such. It is not denied that these machines were devices within the Act. By Section 502 (a), 21 U. S. C. A. § 352 (a), a drug or device shall be deemed to be misbranded if its labeling is false or misleading in any particular. A definition in Section 201, 21 U. S. C. A. § 321, which is the dictionary of the Act, is: "(m) The term 'labeling' means all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." The last three quoted words are critical here. They make the term "labeling" broader than "label" as defined in paragraph (k), which includes only what is "display[ed] * * * upon the immediate container" of an article. How much broader? In *United States v. Research Laboratories*, 9 Cir., 126 F. 2d 42, it was held that printed matter which did not travel with the article but was sent by the same shipper to the same consignee and received at the same time for use in connection with the article, "accompanied" it. But the same court in *Alberty v. United States*, 9 Cir., 159 F. 2d 278, refused so to hold when the printed matter and the article were shipped 2 months apart and not simultaneously. Accepting those decisions as sound, the latter controls here. It is shown that machines valued at \$4,300 were shipped July 25, 1945; value \$1,200 August 14; value \$800 August 18; and value \$1,200 Sept. 21. Kelsch testified that he had an understanding with Urbeteit that he would mail him some printed matter before he finally contracted for the machines, and that the matter was received about September, after the machines were delivered. It was found by the inspectors in Kelsch's consultation room, the machines being all in other rooms, on Sept. 5. The claim alleges the printed matter was mailed Sept. 1. It did not "accompany" in any fair sense either shipment. Both the amended libel and the second amended

libel allege that the false leaflets "accompanied said articles of device when said articles were introduced into and while said articles of device were in interstate commerce." This is the language of Section 304(a), the forfeiture provision of the statute, but it is shown not to be true of any shipment. The first 3 shipments went forward and were received by Kelsch, and put to work in his medical practice several weeks before any leaflets were sent. They did not accompany any of the devices while they were in interstate commerce. The last shipment went forward 3 weeks behind the leaflets, and was not accompanied by them. Accompany means to go along with. In a criminal and forfeiture statute the meaning cannot be stretched.

It may be doubted that the printed matter is in its nature a labeling for the machines. It looks like a small newspaper, entitled "The Road to Health, By Dr. Fred Urbeteit. Every subject pertaining to Health, Doctoring and Nursing is being taught at the College of Sinuothermic Institute, Inc., 307 West Euclid Ave., Tampa, Florida." To the left of this heading is a picture of Dr. Fred Urbeteit, President of Sinuothermic Institute, Inc., and to the right an attractive picture of the Institute and its grounds. Fifteen columns of fine print are below, consisting of testimonials and case histories of patients who had been treated at the Institute by Dr. Urbeteit, with unstinted praise of both. The Sinuothermic machine is mentioned and praised as an instrument of diagnosis and treatment, but there is no description or picture of the machine or any explanation of its operation, or any suggestion that it is for sale. The whole thing appears to be an advertisement for the Institute and Dr. Urbeteit, rather than something to accompany machines. Dr. Urbeteit is licensed as a practitioner of naturopathy in Florida. Dr. Kelsch is a chiropractor in Ohio. Dr. Kelsch became interested in Dr. Urbeteit's work and took a three weeks course at the Institute, and on the strength of it, on returning to Ohio, bought some of the machines, and rented others. He re-rented one to a patient to use at home, and sold one to another patient who moved to another state. The literature apparently was intended to advertise himself as following the methods of Dr. Urbeteit, rather than to explain or sell machines. Whether we ought to hold it a labeling of these machines if shipped simultaneously with them may be doubted. But if it could be called labeling, it is not proved by the present skimpy evidence that it accompanied the machines or any of them while they were in interstate commerce.

* * *

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

UNITED STATES v. KORDEL

Circuit Court of Appeals, Seventh Circuit, 1947. 164 F. 2d 913

SPARKS, Circuit Judge. Appellant was charged by three criminal informations with violation of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 301 et seq. He waived jury trial and, upon trial by the court, was found guilty and fined \$200 on each of the twenty counts contained in the three informations. The appeal is from those judgments.

The facts as to the shipping of the drugs and the literature alleged to constitute the misbranding charged in the informations were entirely stipulated. Error is asserted in the court's finding that that literature "accompanied" the drugs in interstate commerce in the purview of the Act prohibiting the introduction or delivery for introduction of any drug that is misbranded. Other contested issues relate to the degree of proof necessary in a criminal proceeding under the Act, whether the Act should be strictly construed, and whether prosecution should have been by indictment rather than by information.

Appellant is a self-styled authority on nutrition and vitamins. He testified that he had written many papers on the subject of vitamins, herbs, minerals and nutritional diet subjects in general, securing the material for preparation of his papers from books. Operating under various trade names, he had been producing and marketing his own products since January, 1941, largely through "health food" stores. The products appear to be, for the most part, compounded of various vitamins, minerals, and herbs. No charge of falsehood is made as to the principal labels printed on the packages in which each is contained. These labels give the name of the article and distributor, content, recommended dosage, and, in some cases, the alleged daily minimum requirement of the vitamins or minerals therein. Otherwise they give no indication as to their intended uses.²⁸ The misbranding charged is contained in a number of printed pamphlets and circulars, and one display placard. The modes of distribution of this literature differed as charged in the various counts of the informations. In some cases it was contained in the carton in which the articles were shipped. More often, it was separately shipped to the same consignees, and, in at least one case, a period of a year and a half intervened between the shipment of the product and the literature, respectively.

Section 301 of the Food and Drugs Act, as enacted in 1938, 21 U. S. C. A. § 331, prohibits the introduction or delivery for introduction into interstate commerce of any drug that is mis-

²⁸ The articles involved in the three informations are named "Gotu Kola," "Minerals plus Chlorophyll and Vitamin D," "Cetabs," "Fenugreek Tea," "Fero-B-Plex," "Bolax," "Ormotabs," "Ribotabs," "Kordel Tablets," "Everm," "Kordel A," "Garlic Plus," "Niamin," and "Sarsaparilla Tea."

branded; section 502, 21 U. S. C. A. § 352, provides that a drug shall be deemed to be misbranded if its labeling is false or misleading in any particular; and section 201 (m), 21 U. S. C. A. § 321 (m) defines the term "labeling" to include all labels and other written, printed, or graphic matter "(1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

It is now generally held that in order to support a misbranding charge under the Act as amended and revised in 1938, it is not necessary that the matter alleged to accompany the product be shipped in the same container (*United States v. Research Laboratories*, 9 Cir., 126 F. 2d 42), nor even, that it be shipped simultaneously. *United States v. Lee*, 7 Cir., 131 F. 2d 464, 143 A. L. R. 1451; *United States v. 7 Jugs, etc.*, *Rakos*, D. C., 53 F. Supp. 746; *United States v. Paddock*, D. C., 67 F. Supp. 819.

Appellant contends that the cases referred to are not applicable for the reason that all involved civil proceedings rather than criminal, and further, that the literature here involved was not only not shipped in the same carton with the products in all cases, but neither was it intended by him that product and literature should be placed together by the dealer to whom they were sent. His theory apparently is that the matter was not intended for labeling, but for advertising. He points to the fact that all of the printed matter was intended either to be mailed out or to be sold, as indicated by the fact that with the exception of the one display placard, each piece either contained a price mark or a mailing permit with space for address. This, he contends, supports his theory that product and literature were not to be distributed together, hence cannot be said to accompany each other.

We find two answers to this contention. In the first place, labeling and advertising are not mutually exclusive, and the same matter may serve both purposes. As the Court of Appeals for the Ninth Circuit states in *United States v. Research Laboratories*, 9 Cir., 126 F. 2d 42, 45, "Most, if not all, labeling is advertising. The term 'labeling' is defined in the Act as including all printed matter accompanying any article. Congress did not, and we cannot, exclude from the definition printed matter which constitutes advertising." See also *United States v. Paddock*, D. C., 67 F. Supp. 819. In the second place, the placing of the mailing permit or the price tag on the literature cannot insulate appellant from liability for introducing the drugs and their related descriptive matter into interstate commerce together by consignment to the same consignee for distribution by him. The evidence is clear that the booklets were actually displayed on racks close to the counter where the products were

sold and that they were necessary to inform the purchasing public of the uses to which these products were to be put.

We agree with appellee that "the correct concept of 'accompaniment' is one of a commercial or business association." As stated in the Rakos case, *supra* [53 F. Supp. 754], "misbranding has true significance only in terms of the consumer. * * * 'Accompany' as used in this Act is used to describe a relationship between an article of drug and its labeling. Since there 'can be no question that among the usual characteristics of labeling is that of informing a purchaser of the uses of an article to which the labeling relates' (citing the decision of this court in *United States v. Lee, supra*) the booklets here involved should be scrutinized from this viewpoint. In the sense just stated, if the booklets are not labeling, then the products * * * have none."

We, too, are convinced that the test is not of physical contiguity but of textual relationship. Viewed thus, the products and literature here involved were interdependent because without the latter, the former lacked the labeling necessary to inform the purchasing public of their uses and purposes—it is significant that the labels printed on the immediate containers did not indicate the purposes for which the articles were to be used. Hence, the literature was intended and essential to explain the alleged uses of the products. They constituted a supplement to the label physically attached to the product container. One of the health food dealers in whose store the Kordel products were sold admitted that if he were buying one of the products he would have to go to "reliable sources" to know to what use to put the product. Presumably those reliable sources were the booklets displayed in racks close by the counter where the drugs were dispensed or lying on the counters where they were available to the public and could be picked up and examined. Some also were wrapped with merchandise or handed to customers.

We agree with the District Court that, because the literature was shipped by appellant or at his order, to the same consignees as the products, related to those products, and was intended to be distributed in relation to them, it did accompany the products into interstate commerce within the definition of the Act. To hold otherwise would be to permit evasion of the Act by the very easy subterfuge of printing a purchase price or a mailing permit on advertising matter otherwise unquestionably accompanying products into interstate commerce.

With respect to the misrepresentations contained in the accompanying literature we think there can be no serious question. The two booklets, "Nutrition Guide," and "What you can do about relieving the agonies of Arthritis," were written by appellant who, in the latter, is described as "America's leading vitamin and diet expert." "Health Today, Spring 1945," is edited

by the same "famous nutrition and vitamin authority." While all purport to be scientific publications of general interest apart from the articles produced and marketed by appellant, written by an expert in the field, in fact, all are replete with references to the Kordel products and their uses to prevent, ameliorate or cure a vast and diverse variety of ailments, and each conveniently closes with a price list of the various Kordel products recommended for use therein. All are concerned primarily with promoting the sale of the various products by explaining the need for each, along with extravagant claims as to the usefulness of each. A study of the three pamphlets reveals that the products therein described are recommended for relieving stomach agonies, general weakness, anemia, premature old age, high blood pressure, liver troubles, failing eyesight, sore feet; maintaining blood energy, muscular activity, sound teeth and gums, healthy skin, hair and eyes, normal functioning of the pituitary and thyroid glands, stomach, intestines, colon, liver and kidneys; and preventing arthritis and stiff joints, excess weight, catarrh, nervous breakdown, sterility, and paralysis.

Thus the scheme devised by appellant for the distribution of his products and related literature contemplates an elaborate system of self-diagnosis and medication. The danger inherent in this system lies not in any positive unwholesomeness of the articles themselves. As to them as such there is no charge and it may be that they are quite harmless in and of themselves. The danger however, lies in the fact that ignorant and gullible persons are likely to rely upon them instead of seeking professional advice for conditions they are represented to relieve or prevent. The Government introduced the evidence of many very eminent men in the medical profession to prove the dangerously misleading character of the literature in that the drugs were useless to combat the conditions they were represented to relieve, while delay in correct diagnosis and treatment for those conditions might render treatment useless. As one of them stated, the literature encouraged people to experiment with themselves and that meant they were gambling with their health and life. He branded as scientifically ridiculous and nonsensical various of the claims and, when asked whether he would say that the products in themselves were harmful, replied, "They are definitely harmful in that they encourage a patient with a serious disease to experiment with himself when he should seek medical advice and precise diagnosis and therapy."

All were agreed that while the claims were absurd and fantastic they were dangerous in that they tended to lull people into a false sense of security in reliance on the drugs when they might need professional diagnosis and treatment for conditions which might respond to treatment if correctly diagnosed early

enough, but which might become much more serious if not taken care of early. Since the literature which we have already held accompanied the products embodies such misleading representations, it constitutes misbranding within the meaning of the Act.

Appellant contends that, since the current proceedings are criminal, he is entitled to a strict construction of the Act, with proof of the violation, if any, beyond a reasonable doubt. Courts for a long time have been committed to the doctrine of giving statutes intended to protect the public health a very liberal construction. As stated in *Sutherland on Statutory Construction* (Vol. III, sec. 7202), "The public and social purposes served by such legislation greatly exceed the inconvenience and hardship imposed upon the individual, and therefore the former is given greater emphasis in the problems of interpretation. Therefore the courts are inclined to give health statutes a liberal interpretation despite the fact that such statutes are primarily penal in nature and frequently impose criminal penalties." To the same effect is the ruling in *United States v. Dotterweich*, 320 U. S. 277, 64 S. Ct. 134, 88 L. ed. 48, where the Court said, "The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing."

We think there can be no doubt of the sufficiency of the evidence to sustain the charge beyond a reasonable doubt.

Appellant strongly relies upon *Alberty v. United States*, 9 Cir., 159 F. 2d 278, to sustain his proposition that booklets and the like, not shipped at the time of the articles, do not "accompany" the article when they are introduced or offered for introduction into interstate commerce, and consequently cannot "then and there" misbrand them. The Circuit Court of Appeals for the Ninth Circuit there reversed an order overruling a demurrer to an information and remanded the cause with directions to dismiss the information. It distinguished three of the cases to which we have referred (*United States v. Research Laboratories*, *United States v. 7 Jugs*, etc., *Rakos*, and *United States v. Lee*), on the ground that all involved civil proceedings and construed the Act liberally. We have already indicated that under the authorities cited, we do not consider the distinction applicable to the construction of the statute here involved. To the extent that the court limits the definition of the word "accompany" to mean only physical association and contiguity, we do not agree with its reasoning and are convinced that it is not in harmony with those authorities.

* * *

Judgments affirmed.

Excerpts from Oral Arguments before U. S. Supreme Court in Urbeteit and Kordel Cases**THE UNITED STATES LAW WEEK^{28A}**

17 LW 3105-8 Oct. 19, 1948

The attempt of drug and device manufacturers to escape the sanctions of the Federal Food, Drug, and Cosmetic Act by shipping their drugs or devices in one package and their descriptive literature in another package, so that the printed material is not physically "accompanying" the drug or device in interstate commerce, is the subject of two cases argued before the Supreme Court last week. In *United States v. Urbeteit*, No. 13, and *Kordel v. United States*, No. 30, the Government argues that the phrase "accompanying such article" in Section 201(m) should be liberally construed to encompass more than mere physical accompaniment in interstate commerce.

Section 201(m) of the Act, 21 U. S. C. 301, provides that "the term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Section 304 states that "any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found."

Seizure of Device

The *Urbeteit* case is based on a libel of information filed in the Federal District Court for Northern Florida seeking the seizure and condemnation of several devices labeled "Sinuothermic." The libel alleged that the device was misbranded when introduced into and while in interstate commerce in that representations made in a leaflet relating to the curative and therapeutic powers of the device in the diagnosis, treatment, and prevention of disease were false and misleading. It was charged that the leaflet had accompanied the device in interstate commerce.

No Label on Device

It was admitted that the device and a number of leaflets were introduced into interstate commerce in Florida for shipment to Ohio and were in possession of a doctor in Ohio when the libel

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was filed. Some of the leaflets were mailed out to patients of the Ohio doctor and others were shown to patients during consultation. The device bore a label which contained the statement "United States Patent Sinuothermic Trade Mark" together with a serial number, but no other labeling of any kind.

The trial court found that the leaflets accompanied the devices while in interstate commerce, that they claimed diagnostic values and therapeutic effects for the machines, that the device was incapable of diagnosing disease by registering periodic changes in the body, and that the principles on which the machines were claimed to operate were impossible of practical application with these instruments. The court accordingly concluded that the Government was entitled to a decree of condemnation. The Fifth Circuit Court of Appeals, however, reversed the judgment and remanded the cause for further proceedings on the ground that the leaflets had not accompanied the devices while in interstate commerce and therefore did not constitute labeling within the meaning of the Act (164 F. 2d 245, 16 L. W. 2227).

In the Kordel case, three informations containing a total of 20 counts were filed against Kordel in the Federal District Court for Northern Illinois. Each count alleged a violation of Section 301(e) of the Act in that on a specified date Kordel shipped a drug in interstate commerce to a named consignee, that certain literature shipped on a specified date to the same consignee accompanied the drug, and that the drug was misbranded within the meaning of the Act because the statements in the accompanying literature were false and misleading. Kordel was convicted on each of the 20 counts and was sentenced to pay a fine on each count. On appeal to the Court of Appeals for the Seventh Circuit, the judgments were affirmed.

Evasion of Act Charged

Solicitor General Philip B. Perlman commenced the argument in the Urbeteit case with a review of the facts and a demonstration of the device which had been shipped in interstate commerce. He pointed out to the Court that if such evasive schemes as those represented by this dual shipment could be successfully perpetrated, the salutary purpose of the Food, Drug and Cosmetic Act would be defeated.

It is the Government's position, he stated, that it is not necessary for descriptive literature to be shipped in the same container with, or at the same time as, the article to which it relates in order for the literature to constitute labeling "accompanying" an article within the meaning of the Act. The relevant factors, he continued, are interdependence of the literature and the article, their common origin, destination, display, and dis-

tribution, and their purpose and use together. He told the Court that the decision of the Fifth Circuit Court of Appeals would prevent the statute from being invoked against fraudulent and dangerous drugs and devices so long as their distributors utilized the simple scheme of shipping the article apart from the labeling.

He urged on the Court that these leaflets were "labeling" notwithstanding the fact that they also constituted advertising. He explained that the leaflets in the case were prepared by the shipper of the device and were supplied by him to the consignee for the purpose of explaining to prospective purchasers, renters, and patients, the usefulness of the device and how it is employed in the diagnosis, cure, mitigation, and treatment of various diseases. Without the leaflets, he pointed out, the device lacked labeling in that nowhere else was this essential information supplied.

Articles in Commerce

Mr. Justice Reed inquired whether the device was "in interstate commerce" or "held for sale" while it was in the doctor's office.

"It doesn't make any difference," the Solicitor General replied. "The charge here is that the article was misbranded. This case is here on a question of the interpretation of the phrase 'accompanying such article' in Section 201 (m)."

Mr. Justice Reed: "These advertisements were sent through the mails while the device was in the doctor's office?"

"Yes."

"Is there anything in the record to show that they were held for sale in the doctor's office?"

"Yes, the record shows at least one sale of the device by the doctor to a patient."

Mr. Perlman pointed out to the Court that at least seven courts had passed on the issue presented by the instant cases, and that all but two had adopted the broad interpretation which would prevent this obvious evasion of the Food, Drug, and Cosmetic Act. He described the practice as an effort to nullify the Act by separating the mailing from the shipping, the argument of the shippers being that it was necessary for the printed material physically to accompany the device or the drug.

Mr. Justice Reed: "You've got to have something more than 'accompanying,' you've also got to have 'false labeling.'"

"That's right, but the question here is entirely on an interpretation of 'accompanying.'"

Circular as Label

Mr. Justice Jackson, unfolding the lengthy circular and holding up the large square of paper before the Solicitor General,

inquired: "Can you tell me what part of this circular constitutes the label?"

"The whole thing. It was kept in the office with this machine and it was displayed with it."

Mr. Justice Burton: "You say this comes within the statutory definition of 'labeling' although it is not strictly a label?"

"That's right," the Solicitor General replied, pointing to the statutory definition in Section 201 (m) which states that "labeling" means all labels plus other printed matter falling within the definition.

H. O. Pemberton, of Tallahassee, Florida, appearing for the shipper of the devices, reminded the Court that this case involved seizure under a libel for condemnation, and was not a criminal proceeding. He referred to Section 304 of the Act, pointing out that in cases of seizure the devices had to be misbranded "when introduced into or while in" interstate commerce. He stated to the Court that the machines and the pamphlets were never in interstate commerce at the same time.

Mr. Justice Reed: "But the Solicitor General said that the device was in interstate commerce when it was in the doctor's office."

"The machines in the doctor's office were not held for sale, but for use. One machine which the doctor did sell was sold to a patient who lived out of the state."

Advertising Deleted

Mr. Pemberton detailed to the Court the legislative history of the amendments to the original 1906 Food and Drug Act, emphasizing the bills which were introduced during the period 1934-38. One of the first, he pointed out, contained one section defining "labeling" and another section defining "advertising," with the definition of advertising included in the bill right down to the final conference. He observed that the definitions of label and labeling were phrased when the section on advertising was in the statute, concluding therefore that the definition of labeling was intended to exclude advertising material; the definition of advertising material was deleted because of the determination of Congress to leave questions of misrepresentations in advertising to another agency.

Chief Justice Vinson: "What was the definition of 'labeling' in the two bills?"

"The same as it is now."

No Change in 'Labeling'

Mr. Justice Burton suggested that, while the definition of labeling might have a restricted meaning in a bill which also contained a definition of advertising, when the advertising defini-

tion was deleted there might have been left a vacuum into which the labeling definition could move. Mr. Pemberton replied that labeling did not include advertising when the definition was written and that the definition of labeling was not changed when advertising was deleted. He alleged that the Food and Drug Administration was now trying to grab advertising by including it within the definition of labeling, even though Congress specifically took advertising away from them.

Mr. Pemberton referred to the legislative history to show the distinction between "label" and "labeling," pointing out that the latter included printed material which is inside the package and may escape the notice of the ultimate consumer. The idea of the bill before Congress, he contended, was that unless the false and misleading material was on the label, it would not authorize seizure of the goods, although it might authorize prosecution under the Act.

Mr. Justice Reed: "The bill that became law, did it contain these provisions?"

"Yes, all except advertising."

"But that's what we're talking about."

Mr. Justice Reed continued: "If these machines were in interstate commerce—"

"They were not in interstate commerce."

"But if they were, would it be a violation of the Act?"

"I'll go one step further. If the machines and pamphlets were held together and were held for resale, it would be a violation of the Act, but that would authorize a criminal prosecution, not seizure."

"Does your defense turn on whether they were held for sale?"

"No, under the seizure provision the machine must have been mislabeled while in interstate commerce."

Chief Justice Vinson: "Was the definition of advertising in the bill that passed the House?"

"It was in the bill considered by the Committees. I don't know whether it actually passed the House."

The argument in the second case [*Kordel v. United States*] was commenced by Arthur D. Herrick, of New York, who pointed out to the Court that the criminal prosecution in his case was based upon three sets of printed matter: (1) booklets that were shipped from two to 561 days apart from the drugs; (2) printed matter that was shipped directly to the dealer from three to six months apart from the drugs, for remailing purposes; and (3) health books which were sold for 25 cents.

Mr. Justice Reed: "You have no contest here as to whether they were in interstate commerce?"

"No, I think Your Honors answered that question in the Sullivan case [16 L. W. 4092]."

Physically Accompany

Counsel explained to the Court that his contention basically was that none of this printed material constituted labeling within the definition of section 201(m), since none of the printed matter accompanied the drugs in commerce. He argued that the Government had fixed on certain printed matter, and then had "shopped around" to find some device they could tie the printed matter to. If the Court finds that "accompany" means "physically accompany," he urged, it would have to reverse the convictions.

Mr. Justice Frankfurter: "Then that's your position, that the printed matter must contemporaneously physically accompany the drug?"

"Yes."

"May I ask whether your test of contemporaneous physical accompaniment would exclude sending conceded labels in separate packages at the very same time as the drug was mailed?"

"That question was answered in the Lee case [U. S. v. Lee, 131 F. 2d 461, 11 L. W. 2474]. The Lee answer is that if they are brought together at any time in interstate commerce, the printed matter constitutes labeling. However, that was a civil seizure case."

"Suppose an unlabeled drug is shipped in commerce—"

"That would break the law about a dozen times."

"Then suppose there is one label on the bottle, but another label is sent in a separate package, and the retailer brings them together."

"The Government can seize them at that time, if they are ever brought together in interstate commerce. But the charge here is the introduction into commerce of a misbranded drug."

Mr. Herrick referred to the legislative history of the statute, alleging that Congress was interested in the package and in its immediate label.

Mr. Justice Frankfurter: "If you're right about that, then this is easy."

"That's my contention."

Separate in Time and Space

Counsel stated that printed matter, if separated in time or space from the drug which it described, was advertising rather than labeling. He referred again to the legislative history of the various bills introduced from 1933 to 1938, pointing out that Congress relied upon the language of the Supreme Court in the McDermott case, 228 U. S. 124, and in Seven Cases v. United States, 239 U. S. 510, among others. He averred that Congress in using the phrase "accompanying such article" intended the mean-

ing ascribed to that phrase in the Seven Cases decision, in which the Court stated: "The power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is on or in the package that is transported in interstate commerce."

Mr. Justice Frankfurter: "I think you have proved that if the printed matter is inside the package it is accompanying the drug. But have you proved that if it is not inside, it cannot be accompanying?"

"I think so, because we must look to the intent of Congress in inserting that phrase in the statute."

Transfer to FTC

Mr. Herrick referred to Mr. Justice Burton's suggestion that when Congress struck out the definition of advertising it left a vacuum into which the definition of labeling might have moved, and pointed out that Congress did not strike out the definition of advertising, but merely transferred the power over advertising to the Federal Trade Commission under the Wheeler-Lea Amendment. "The Food and Drug Administration," he stated to the Court, "will tell you today that they need control over advertising, but they also told that to Congress and Congress determined that the power over advertising should belong to the Federal Trade Commission, not the Food and Drug Administration."

Mr. Herrick devoted the remainder of his oral argument to a second question, whether Kordel was improperly prosecuted by information instead of by indictment. He referred the Court to the penalty provision of the Food, Drug, and Cosmetic Act, which states that "(a) Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; * * * (b) Notwithstanding the provisions of subsection (a) of this section, in case of violation of any of the provisions of Section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000 or both such imprisonment and fine."

Infamous Crime

Kordel was charged in all the informations with the introduction into interstate commerce of misbranded drugs; there is only one such offense stated in the statute. The additional period of imprisonment provided in Section 303(b) of the Act is in the penalty section, not the offense section of the statute. Accordingly, counsel argued, since his client could have been sent to

prison for three years, he was being tried for an infamous crime which under the Constitution requires indictment by a grand jury. Mr. Herrick stated that the Government's position was that if they did not plead intent to defraud, the increased penalty was not available to the judge. However, he characterized this argument as "nonsense," pointing out that in *Husty v. United States*, 282 U. S. 694, 75 L. ed. 629, 51 S. Ct. 240, a case under the Jones Act, it was held that the imposition of the penalty is entirely within the discretion of the judge.

Chief Justice Vinson: "Is it your position that where the Government proceeds on information and does not allege intent to defraud, the Court could send the accused to prison for three years?"

"It is."

"I thought there were two sections."

"But only one crime. The distinction is only in the penalty section, which is addressed to the discretion of the judge."

Mr. Justice Rutledge: "Then Congress has imposed a penalty that cannot be imposed except upon indictment."

Mr. Justice Frankfurter: "You're not suggesting, are you, that every prosecution should be prosecuted by indictment, but merely that the judge should not be able to sentence defendant to three years unless he is prosecuted by indictment?"

"Yes, I'm arguing that every prosecution should be prosecuted by indictment."

Mr. Justice Reed: "There was no charge of intent here?"

"No, and we contend it wasn't necessary."

Plugging the Loopholes

Solicitor General Perlman continued the argument in the second case, urging that the important consideration was the intent of Congress in the 1938 amendment to the Food and Drug Act. He detailed the history of the statute from 1906, when the Act prohibited the introduction into commerce of any product which "shall bear" false and misleading printed matter. The drug and devices industry met this statute by putting their printed matter inside the package but not affixed to the bottle. In 1912, he continued, Congress plugged this loophole by prohibiting the introduction of any package which shall "bear or contain" false printed matter, but it was found that even this was not sufficient because the industry met the problem by shipping the false labels and circulars outside the package. From 1933 to 1938, the Solicitor General continued, Congress made a comprehensive survey of the field and came up with the present statutory provision by which it intended to plug all the loopholes through which the statute had been evaded.

Referring to the definition of advertising which was deleted

from one of the early food and drug bills, Mr. Perlman stated that the advertising which Congress had in mind when it transferred jurisdiction to the FTC was that found in newspapers, periodicals, and radio commercials. This type of advertising, he contended, is entirely different from the labels, circulars, and other printed matter used in connection with drugs or devices and designed to mislead and defraud the general public.

Mr. Justice Burton: "You think the Federal Trade Commission could not prosecute these defendants for false advertising?"

"I think they could, but these statutes do not necessarily exclude each other."

Mr. Justice Frankfurter: "Is there any light in the legislative reports on the use of the term 'accompany'?"

"There is no discussion of it that I can refer Your Honor to, but the way the amendment was adopted and the reasons for it are sufficient explanation of what Congress intended."

The Solicitor General referred the court to the statute's definition of "label," and then pointed out that the definition of "labeling" includes placards for display purposes, which are known to the general public as a form of advertising. He stated that except for the Fifth and Ninth Circuits, the courts have said that the phrase "accompany" has reference to drugs and printed matter used to defraud or mislead the ultimate consumer and having a common origin and common destination. A scheme of distribution, with one dependent upon the other, in which the drug is not used or sold except in connection with the circulars or labeling intended to be shown to the ultimate consumer, he averred, is what the Act was intended to prohibit.

Mr. Justice Frankfurter: "You ask this Court to hold that 'accompanying such article' means 'functionally related'?"

"That's right. The courts have said 'if associated with for business or commercial purposes,' but Your Honor's phrase is much more descriptive."

"You mean that Congress used an ordinary English word that we have to translate into some such phrase as I have given?"

"Yes, all the courts except two have so held."

The Solicitor General noted that the House Report on the bill which was introduced to amend the Food and Drug Act was labeled "Report to Accompany S. 5," but he pointed out that the word accompany in this connection did not necessarily mean physically attached. Chief Justice Vinson agreed stating: "In fact, the bill might have been introduced six months before the report."

In answer to a question by Mr. Justice Jackson as to the limits of the Food and Drug Administration's control of advertising in newspapers and radio, the Solicitor General pointed

to the limitations in section 201(m) and stated: "What occurs on the radio has no application to this case."

Mr. Justice Jackson: "I was brought up in that era when it was required to construe a criminal statute strictly. In this statute there are civil and criminal penalties. Are we to construe one case liberally and one strictly?"

"That question has already been answered in the *Dotterweich* case (320 U. S. 277). In that case Mr. Justice Frankfurter said that you must construe this statute liberally to effectuate the purpose of Congress. Mr. Justice Black said the same thing in the *Sullivan* case."

"How far are you going to take the word out of its ordinary meaning to effectuate the intent of Congress?"

"I don't think we are taking it out of its ordinary meaning. All the courts but two have held that the word is to be construed textually, not to be construed narrowly as meaning only physical accompaniment."

Mr. Justice Frankfurter, referring to the two subsections of Section 201(m), stated: "Section 1 is certainly physical, for it covers labels 'upon' the package. Section 2 is an extension that you say is not physical. Do you mean that physical relation has no significance?"

"Yes."

"Then (1) is physical and (2) is functional?"

"Yes."

Mr. Justice Rutledge posed the question whether the Act would cover a case in which a drug was sent from New York to Chattanooga, while the label was sent from Chicago to Chattanooga. The Solicitor General replied that that would not be outside the Act.

"But these have a different origin."

"If we can show that they are part of the same distributional scheme and that the product could not be marketed without the label, then it is covered by the Act."

The purpose of this legislation, Mr. Perlman continued, is to protect the ultimate consumer, and the use of any devices or distributional schemes intended to mislead and defraud the public is covered by the statute.

Mr. Justice Frankfurter, referring to the hypothetical case posed by Mr. Justice Rutledge, stated: "If that's within the Act, this case is easy."

Discussing the concept of "motion" as distinguished from "relation," Mr. Justice Frankfurter then asked: "If 'accompany' means, 'functionally related to' and has no idea of motion, did the lower courts, which passed on cases all of which involved actual

shipment, go on the ground of relative relation or relative motion?"

"Relative relation."

KORDEL v. UNITED STATES²²

Supreme Court of the United States, 1948, 335 U. S. 345,
93 L. ed. 73, 69 S. Ct. 106

Mr. Justice DOUGLAS delivered the opinion of the court.

This case and *United States v. Urbeteit*, decided this day, are here on certiorari to resolve a conflict among the circuits in the construction of the Federal Food, Drug and Cosmetic Act of June 25, 1938. 52 Stat. 1040, 21 U. S. C. § 301 *et seq.*

Kordel is charged by informations containing twenty counts of introducing or delivering for introduction into interstate commerce misbranded drugs. He was tried without a jury, found guilty, and fined two hundred dollars on each count. This judgment was affirmed on appeal. 164 F. 2d 913.

Kordel writes and lectures on health foods from information derived from studies in public and private libraries. Since 1941 he has been marketing his own health food products, which appear to be compounds of various vitamins, minerals and herbs. The alleged misbranding consists of statements in circulars or pamphlets distributed to consumers by the vendors of the products, relating to their efficacy. The petitioner supplies these pamphlets as well as the products to the vendors. Some of the literature was displayed in stores in which the petitioner's products were on sale. Some of it was given away with the sale of products; some sold independently of the drugs; and some mailed to customers by the vendors.

It is undisputed that petitioner shipped or caused to be shipped in interstate commerce both the drugs and the literature. Seven of the counts charged that the drugs and literature were shipped in the same cartons. The literature involved in the other counts was shipped separately from the drugs and at different times—both before and after the shipments of the drugs with which they were associated. The question whether the separate shipment of the literature saved the drugs from being misbranded within the meaning of the Act presents the main issue in the case.

Section 301 (a) of the Act prohibits the introduction into interstate commerce of any drug that is adulterated or misbranded. It is misbranded according to § 502 (a) if its "labeling is false or misleading in any particular," unless the labeling bears "adequate directions for use." § 502 (f). The term labeling is defined in § 201 (m) to mean "all labels and other written,

²² The selected footnotes have been renumbered.

printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Section 303 makes the violation of any of the provisions of § 301 a crime.

In this case the drugs and the literature had a common origin and a common destination. The literature was used in the sale of the drugs. It explained their uses. Nowhere else was the purchaser advised how to use them. It constituted an essential supplement to the label attached to the package. Thus the products and the literature were interdependent, as the Court of Appeals observed.

It would take an extremely narrow reading of the Act to hold that these drugs were not misbranded. A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States v. Resnick*, 299 U. S. 207, 81 L. ed. 127 57 S. Ct. 126; *Kraus & Bros. v. United States*, 327 U. S. 614, 621-622, 90 L. ed. 894, 66 S. Ct. 705), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States v. Sullivan*, 332 U. S. 689, 693, 92 L. ed. 305, 68 S. Ct. 331; *Winters v. New York*, 333 U. S. 507, 92 L. ed. 654, 68 S. Ct. 665. But there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it. See *Roschen v. Ward*, 279 U. S. 337, 339, 73 L. ed. 722, 49 S. Ct. 336.

It would, indeed, create an obviously wide loophole to hold that these drugs would be misbranded if the literature had been shipped in the same container but not misbranded if the literature left in the next or in the preceding mail. The high purpose of the Act to protect consumers who under present conditions are largely unable to protect themselves in this field³⁰ would then be easily defeated. The administrative agency charged with its enforcement³¹ has not given the Act any such restricted construction.³² The textual structure of the Act is not agreeable to it. Accordingly, we conclude that the phrase "accompanying such article" is not restricted to labels that are on or in the article or package that is transported.

The first clause of § 201(m)—all labels "upon any article or any of its containers or wrappers"—clearly embraces advertis-

³⁰ See *United States v. Dotterweich*, 320 U. S. 277, 280, 88 L. ed. 48, 64 S. Ct. 134; *United States v. Sullivan*, *supra*, p. 696.

³¹ See § 701 and § 201(c), 1940 Reorg. Plan No. IV, § 12, 54 Stat. 231, 5 U. S. C. § 133(u).

³² The Federal Security Agency by regulation (21 C. F. R. Cum. Supp. § 2.2) has ruled:

"Labeling includes all written, printed, or graphic matter accompanying an article at any time while such article is in interstate commerce or held for sale after shipment or delivery in interstate commerce."

ing or descriptive matter that goes with the package in which the articles are transported. The second clause—"accompanying such article" has no specific reference to packages, containers or their contents as did a predecessor statute. See *Seven Cases v. United States*, 239 U. S. 510, 513, 515, 60 L. ed. 411, 36 S. Ct. 190. It plainly includes what is contained within the package whether or not it is "upon" the article or its wrapper or container. But the second clause does not say "accompanying such article in the package or container," and we see no reason for reading the additional words into the text.

One article or thing is accompanied by another when it supplements or explains it, in the manner that a committee report of the Congress accompanies a bill. No physical attachment one to the other is necessary. It is the textual relationship that is significant. The analogy to the present case is obvious. We need not labor the point.

The false and misleading literature in the present case was designed for use in the distribution and sale of the drug, and it was so used. The fact that it went in a different mail was wholly irrelevant whether we judge the transaction by purpose or result. And to say that the prior or subsequent shipment of the literature disproves that it "is" misbranded when introduced into commerce within the meaning of § 301(a), is to overlook the integrated nature of the transactions established in this case.

Moreover, the fact that some of the booklets carried a selling price is immaterial on the facts shown here. As stated by the Court of Appeals, the booklets and drugs were nonetheless interdependent; they were parts of an integrated distribution program. The Act cannot be circumvented by the easy device of a "sale" of the advertising matter where the advertising performs the function of labeling.

Petitioner points out that in the evolution of the Act the ban on false advertising was eliminated, the control over it being transferred to the Federal Trade Commission. 52 Stat. 114, 15 U. S. C. § 55(a). We have searched the legislative history in vain, however, to find any indication that Congress had the purpose to eliminate from the Act advertising which performs the function of labeling. Every labeling is in a sense an advertisement. The advertising which we have here performs the same function as it would if it were on the article or on the containers or wrappers. As we have said, physical attachment or contiguity is unnecessary under § 201(m) (2).

There is a suggestion that the offense in this case falls under § 301(k) of the Act which includes misbranding of a drug while it is held for sale after shipment in interstate commerce. Since the informations contain no such charge, it is therefore claimed that the judgment must be reversed. We do not agree. Section

301(k) has a broad sweep, not restricted to those who introduce or deliver for introduction drugs in interstate commerce.³³ See *United States v. Sullivan*, *supra*. Nor is it confined to adulteration or misbranding as is § 301(a). *Id.* It is, however, restricted to cases where the article is held for sale after shipment in interstate commerce; and, unlike § 301(a) it does not reach situations where the manufacturer sells directly to the consumer. Cf. *United States v. Urbeteit*, *supra*. Hence we conclude that we do not disturb the statutory scheme when we refuse to take from § 301(a) what is fairly included in it in order to leave the matter wholly to the service of § 301(k). The reach of § 301(a) is in this respect longer. Such a transfer to § 301(k) would create a new hiatus in the Act and thus disturb the pattern which we discern in it.

We have considered the other objections tendered by petitioner and find them without merit.

Affirmed.

Mr. Justice BLACK, with whom Mr. Justice FRANKFURTER, Mr. Justice MURPHY and Mr. Justice JACKSON concur, dissenting.

I agree with the court's interpretation of § 502(a) and § 201(m) of the Pure Food and Drug Act. These sections considered together provide a definition for the "misbranding" of drugs. I agree that a drug is misbranded within the meaning of the statute if false and misleading written, printed, or graphic matter is either placed upon the drug, its container or wrappers, or used in the sale of the drug as a supplement to the package label to advise consumers how to use the drug. I agree that false labels may, within the meaning of the statute, "accompany," that is go along with, a drug on its interstate journey even though not in the same carton, on the same train, in the same mail, or delivered for shipment the same day. But these agreements do not settle all the problems in this case.

The Pure Food and Drug Act does not purport to make all misbranding of drugs within the foregoing definition a federal offense. Congressional power to pass the Act is based upon the commerce clause. Consequently misbranding is only an offense if the misbranded drugs bear the statutorily defined relationships to interstate commerce. For illustration, if a person misbranded a drug which had not been and was not thereafter introduced into interstate commerce, there would be no violation of the federal Act, whatever violation there might be of state law.

³³ The purpose of § 301(k) was described in H. Rep. No. 2139, 75th Cong., 3rd Sess. 3 (1938), as follows:

"In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment."

As we pointed out in *United States v. Sullivan*, 332 U. S. 689, the Pure Food and Drug Act creates several offenses each of which separately depends upon the relationship the misbranded drug then bears to interstate commerce. Section 301(a) forbids the "introduction or delivery for introduction into interstate commerce" of misbranded drugs; § 301(b) forbids misbranding while the drugs are "in interstate commerce"; § 301(c) prohibits the "receipt" of such drugs in interstate commerce; and § 301(k) forbids misbranding while drugs are "held for sale after shipment in interstate commerce."

The twenty counts of the information upon which this petitioner's conviction rests, charge that he had introduced drugs into interstate commerce, and that "when" he so introduced the drugs, they were "misbranded . . . in that . . . statements appearing in . . . bulletins and booklets *accompanying*" the drugs "were false and misleading." (Emphasis supplied.) The undisputed evidence as to thirteen of the counts showed that when the drugs were "introduced" into interstate commerce for shipment, they were not within any fair meaning of the word "accompanied" by the printed matter relied on as "labeling". The evidence under one count was that the drugs were shipped July 10, 1942, while the booklets said to be "labels" were sent a year and a half later, January 18, 1944. Thus, each of these counts charged a violation of the separate and distinct offense of introducing misbranded drugs into interstate commerce, prohibited by § 301(a). The evidence proves the offense, if any, of violation of § 301(k), which prohibits the misbranding of drugs while held for sale after an interstate shipment.

The court's interpretation of § 301(a) seems to me to create a new offense to make it a crime to introduce drugs into interstate commerce if they should subsequently be misbranded, even so long as eighteen months later while held for sale. This judicial action is justified in part on the ground that the offense Congress created in § 301(k) for holding misbranded drugs for sale after interstate shipment might not reach all situations covered by the congressionally created offense defined by § 301(a). If as the Court believes, Congress in § 301(k) has limited the situations for which it will direct punishment for holding misbranded articles for sale, I cannot agree that we should rewrite § 301(a) so as to broaden its coverage. If Congress left a hiatus, Congress should fill it if it so desires. While I do not doubt the wisdom of separating these offenses as Congress has here done, we must remember that there are dangers in splitting up one and the same transaction into many offenses. See *Blockberger v. United States*, 284 U. S. 299, 304-305, 76 L. ed. 306, 52 S. Ct. 180.

These are serious offenses. While petitioner was fined only \$200 on each count, or a total of \$4,000, the maximum allowable

punishment was \$1,000 per count and imprisonment for one year, or for three years under other circumstances. § 303(a). The approach of Congress in this field of penal regulation has been cautious. The language used by Congress in the present law in defining new offenses has been marked by precision. I think we should exercise a similar caution before reading into the "introduction to interstate commerce" offense, conduct which patently fits into the "held for sale" offense.

I would reverse the judgment here insofar as it rests on the thirteen counts in which the Government charged offenses under § 301(a) and failed to prove them.

UNITED STATES v. URBETEIT

Supreme Court of the United States, 1948, 335 U. S. 355,
93 L. ed. 79, 69 S. Ct. 112

Mr. Justice DOUGLAS delivered the opinion of the court.

The United States filed a libel under the Federal Food, Drug, and Cosmetic Act (52 Stat. 1044, 21 U. S. C. § 334), seeking seizure of 16 machines labeled "Sinuothermic." The libel alleged that the device was misbranded within the meaning of the Act (52 Stat. 1050, 21 U. S. C. § 352(a)) in that representations in a leaflet entitled "Road to Health" relative to the curative and therapeutic powers of the device in the diagnosis, cure, mitigation, treatment and prevention of disease were false and misleading. It charged that the leaflet had accompanied the device in interstate commerce.

Respondent, Fred Urbeteit, appeared as claimant of several of the devices. He admitted that the devices and leaflets had been shipped in interstate commerce, but denied that they were shipped together or that they were related to each other. He also denied that the statements made in the leaflet were false or misleading. The case was tried without a jury and the articles were ordered condemned. The judgment was reversed by the Court of Appeals, 164 F. 2d 245. The case is here on certiorari to resolve the conflict between it and *Kordel v. United States*, . . .

Respondent Urbeteit terms himself a naturopathic physician and conducts the Sinuothermic Institute in Tampa, Florida. The machines against which the libel was filed are electrical devices allegedly aiding in the diagnosis and cure of various diseases and physical disorders such as cancer, diabetes, tuberculosis, arthritis, and paralysis. The alleged cures effected through its use are described in the allegedly false and misleading leaflet, *The Road to Health*, published by Urbeteit and distributed for use with the machines.

Urbeteit shipped from Florida a number of these machines to one Kelsch, a former pupil of his who lives in Ohio. Kelsch

used these machines in treating his patients and, though he did not receive them as a merchant, he sold some to patients. As part of this transaction Urbeteit contracted to furnish Kelsch with a supply of leaflets, which were sent from Florida to Ohio at a different time than when the machines were forwarded. Kelsch used the leaflets to explain the machines to his patients.

The leaflets seem to have followed the shipment of the machines. But as *Kordel v. United States* holds, that is immaterial where the advertising matter that was sent was designed to serve and did in fact serve the purposes of labeling. This machine bore only the words, U. S. Patent Sinuothermic Trade Mark. It was the leaflets that explained the usefulness of the device in the diagnosis, treatment, and cure of various diseases. Measured by functional standards, as § 201(m) (2) of the Act permits, these leaflets constituted one of the types of labeling which the Act condemns.

The power to condemn is contained in § 304(a) and is confined to articles "adulterated or misbranded when introduced into or while in interstate commerce." We do not, however, read that provision as requiring the advertising matter to travel with the machine. The reasons of policy which argue against that in the case of criminal prosecutions under § 303 are equally forcible when we come to libels under § 304(a). Moreover, the common sense of the matter is to view the interstate transaction in its entirety—the purpose of the advertising and its actual use. In this case it is plain to us that the movements of machines and leaflets in interstate commerce were a single interrelated activity, not separate or isolated ones. The Act is not concerned with the purification of the stream of commerce in the abstract. The problem is a practical one of consumer protection, not dialectics. The fact that the false literature leaves in a separate mail does not save the article from being misbranded. Where by functional standards the two transactions are integrated, the requirements of § 304(a) are satisfied though the mailings or shipments are at different times.

The Court of Appeals held that certain evidence tendered by Urbeteit as to the therapeutic or curative value of the machines had been erroneously excluded at the trial, a ruling that we are not inclined to disturb. Petitioner claims, however, that the error was not prejudicial. The argument is that since the evidence of the false and misleading character of the advertising as respects the diagnostic capabilities of the machines was overwhelming, that false representation was adequate to sustain the condemnation, though it be assumed that the therapeutic phase of the case was not established. We do not reach that question. Since the case must be remanded to the Court of Appeals, that

question and any others that have survived will be open for consideration by it.

Reversed.

Mr. Justice BLACK, Mr. Justice FRANKFURTER, Mr. Justice MURPHY, and Mr. Justice JACKSON dissent for the reasons stated in their dissent in *Kordel v. United States*.

UNITED STATES v. BUFFALO PHARMACAL CO.³⁴

Circuit Court of Appeals, Second Circuit, 1942. 131 F. 2d 500

SWAN, Circuit Judge. The appellant was prosecuted, together with Buffalo Pharmacal Company, Inc., a New York Corporation of which he was general manager, for violations of section 301(a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 331(a). Three counts of the informations were submitted to the jury. The first count was based on an interstate shipment on October 2, 1939, of a bottle of cascara compound which was charged to be misbranded, 21 U. S. C. A. § 352(a); the other two counts related to an interstate shipment on January 9, 1940, of a bottle of digitalis tablets, one of the counts charging adulteration, 21 U. S. C. A. § 351(c), and the other misbranding, 21 U. S. C. A. § 352(a). Each of the shipments was made in filling an order received through the mails by Buffalo Pharmacal Company from a physician resident in a state other than New York. The corporation had purchased the drugs from a wholesale manufacturer; it repackaged them for the shipments under attack. The appellant Dotterweich had no personal connection with either shipment, but he was in general charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians. The jury found him guilty on all three counts. For some unexplainable reason it disagreed as to the corporation's guilt. The sentence imposed on the appellant was a fine of \$500 on each count, with payment suspended on the second and third counts, and probation for 60 days on each count to run concurrently.

The bottle of cascara compound carried a label reading "1000 Tablets Cascara Compound * * * (Hinkle)," followed by a list of the ingredients, one of which was strychnine sulphate. The charge of misbranding was based on the fact that this ingredient had been removed from the formula for Hinkle pills stated in the official National Formulary promulgated January 1, 1939. The issue left to the jury was whether the label was false and misleading in that it would lead the purchaser or the general public to believe that the tablets contained only the ingredients designated in the official formula for Hinkle pills. Since inten-

³⁴ The footnotes have been omitted.

tion to violate the statute is immaterial in a charge of misbranding, we think the jury's finding that the label was false and misleading was not unsupported by the evidence.

The label on the bottle of digitalis tablets represented that each tablet possessed a potency of one U. S. P. unit of digitalis, whereas in fact analysis proved that the tablets were less than one-half of the represented potency. This was so far below the standard that findings of adulteration and misbranding would seem to be inevitable, unless the deterioration occurred after the bottle of tablets was shipped. It was shipped on January 9, 1940 and its contents were analyzed by government chemists in March, 1940. While cross examination brought out that digitalis tablets may deteriorate in potency by lapse of time if not properly stored, there was some testimony to indicate that the bottle in question had been properly cared for. We cannot say that the evidence was insufficient to support the verdict of adulteration and misbranding.

Section 305 of the Act, set forth in the margin, provides that before the Administrator reports a violation to any United States attorney for prosecution, "the person against whom such proceeding is contemplated" shall be given notice and a hearing. In the case at bar such notice was addressed only to the corporation. In response thereto the appellant appeared on behalf of the corporation. He contends that a notice addressed to him personally was a condition precedent to his lawful prosecution. The district judge ruled that the provision for notice and a hearing was an administrative direction to the Administrator rather than a jurisdictional requirement for criminal proceedings. We agree with this conclusion. Such was the authoritative construction placed upon a similar provision in the Food and Drugs Act of 1906, 21 U. S. C. A. § 11. *United States v. Morgan*, 222 U. S. 274, 32 S. Ct. 81, 56 L. ed. 198; see also *United States v. King & Howe*, 2 Cir., 78 F. 2d 693, 696. In our opinion the changes in phraseology introduced by the 1938 Act are not such as to render obsolete these decisions. This appears quite clearly from the Congressional debates. 83 Cong. Rec. pp. 7792, 7794, 75th Cong., 3d sess. Articles by certain commentators are cited as expressing the opposite view, but we are constrained to disagree with them.

The appellant further urges that the jury's failure to convict the corporation is so inconsistent with the finding of guilt on the part of the appellant that the verdict against him cannot stand. Assuming that the statute includes within its prohibitions an agent who acts for his employer in shipping in interstate commerce misbranded or adulterated articles, the contention is without merit. No authority has been cited in support of the argument that failure to convict the principal will

avoid the conviction of an agent who has committed all the elements of a crime. We think the usual principle is applicable that error cannot be asserted for inconsistency in the jury's verdict. See *Dunn v. United States*, 284 U. S. 390, 52 S. Ct. 189, 76 L. ed. 356, 80 A. L. R. 161; *United States v. Pandolfi*, 2 Cir., 110 F. 2d 736.

A more difficult question is presented by the appellant's contention that the statute is aimed only at punishment of the principal and not at punishment of an innocent agent who in good faith and in ignorance of the misbranding or adulteration takes part in interstate shipment of food or drugs. Section 301, 21 U. S. C. A. § 331, prohibits "the following acts and the causing thereof," namely, "(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." Section 333(a) of Title 21 declares that "any person" who violates any of the provisions of section 331 shall be guilty of a misdemeanor and on conviction be subject to imprisonment or fine or both. The Act defines the term "person" to include "individual, partnership, corporation, and association." 21 U. S. C. A. § 321(e). Who is the person causing "the introduction or delivery for introduction" into interstate commerce of a misbranded drug? Is the clerk who innocently packs or ships it guilty of the offense, as well as the employer for whom he works? While the statutory language seems literally to include all who have any part in causing delivery for introduction into interstate commerce, there are serious objections to so construing it. Subsection (c) of 21 U. S. C. A. § 333 provides: "No person shall be subject to the penalties of subsection (a) of this section * * * for having violated section 331(a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 331(a), that such article is not adulterated or misbranded, within the meaning of this chapter designating this chapter * * * ." Obviously such a guaranty, if given, will be obtained by the drug dealer, not by his clerk who may later deliver the article for shipment in interstate commerce; nor is such clerk literally within the protection of the quoted section, since he is not the one who "received" the article from the guarantor. It is difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten one. The agent's guilt, like his principal's, must be independent of any scienter under section 331(a). It would be extremely harsh to charge him criminally with the risks of the business as the drug dealer is himself charged. A majority of the court is of

opinion that this cannot have been the congressional intent and that the statute must be construed to mean that only the drug dealer, whether corporation or individual, is the "person" who causes the "introduction" or "delivery for introduction" of misbranded or adulterated drugs into commerce. In support of this conclusion the appellant adverts to the omission from the present Act of a provision which appeared in the 1906 Act in 21 U. S. C. A. § 4. This declared that in construing and enforcing the provisions of sections 1 to 15 of Title 21 "the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation * * * within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation * * * as well as that of the person." In our opinion the omission of this provision adds nothing to the argument already developed; it was doubtless omitted as unnecessary because it states an obvious general principle of agency.

The foregoing discussion has proceeded upon the assumption that if the statute is applicable to the appellant it must also apply to a shipping clerk or any menial employee who was instrumental in causing the forbidden shipment, for we can find no basis in the statutory language for drawing a distinction between agents of high or low rank. We are not, however, to be understood to hold that under no circumstances could an individual conducting a drug business in corporate form be subjected to the penalties of section 331(a). If an individual operated a corporation as his "alter ego" or agent he might be the principal; but the evidence hardly went so far as to establish that such was the relationship between the appellant and his corporation and in any event his guilt was not made to turn on any such issue. Accordingly his conviction must be reversed.

The views above expressed in respect to the construction of the statute are those of a majority of the court. I am not in accord with them. I believe that the language of sections 331(a) and 333(a) is so inclusive as to render liable all persons who take part in causing a shipment in interstate commerce of misbranded or adulterated articles, and that any insufficiency in the protection afforded an agent by section 333(c) is not an adequate reason for limiting the statutory prohibitions to the dealer. The possibility that a literal interpretation of the statute may lead to the prosecution of insignificant agents rather than their employers is not, I believe, a serious risk and is a matter Congress was willing to leave to the good sense of prosecuting officials and trial juries. See *United States v. Buffalo Cold Storage Co.*, D. C. W. D. N. Y., 179 F. 865, 867, where a warehouseman who innocently shipped pursuant to instructions was convicted under

the 1906 Act; see also the charge given by Judge Grubb in *United States v. Mayfield*, D. C. Ala., 177 F. 765.

Judgment reversed.

UNITED STATES v. DOTTERWEICH

Supreme Court of the United States, 1943. 320 U. S. 277,
88 L. ed. 48, 64 Sup. Ct. 134

Mr. Justice FRANKFURTER delivered the opinion of the court.

This was a prosecution begun by two informations, consolidated for trial, charging Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, with violations of the Act of Congress of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. §§ 301-392, known as the Federal Food, Drug, and Cosmetic Act. The Company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. (No question is raised in this case regarding the implications that may properly arise when, although the manufacturer gives the jobber a guaranty, the latter through his own label makes representations.) The informations were based on § 301 of that Act (21 U. S. C. § 331), paragraph (a) of which prohibits "The introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." "Any person" violating this provision is, by paragraph (a) of § 303 (21 U. S. C. § 333), made "guilty of a misdemeanor." Three counts went to the jury—two, for shipping misbranded drugs in interstate commerce, and a third, for so shipping an adulterated drug. The jury disagreed as to the corporation and found Dotterweich guilty on all three counts. We start with the finding of the Circuit Court of Appeals that the evidence was adequate to support the verdict of adulteration and misbranding. 131 F. 2d 500, 502.

Two other questions which the Circuit Court of Appeals decided against Dotterweich call only for summary disposition to clear the path for the main question before us. He invoked § 305 of the Act requiring the Administrator, before reporting a violation for prosecution by a United States attorney, to give the suspect an "opportunity to present his views." We agree with the Circuit Court of Appeals that the giving of such an opportunity, which was not accorded to Dotterweich, is not a prerequisite to prosecution. This Court so held in *United States v. Morgan*, 222 U. S. 274, 56 L. ed. 198, 32 S. Ct. 81, in construing the Food and Drugs Act of 1906, 34 Stat. 768, and the legislative history to which the court below called attention abundantly proves that Congress, in the changed phraseology of 1938, did not intend to introduce a change of substance. 83 Cong. Rec. 7792-94. Equally baseless is the claim of Dotterweich that, having failed to find

the corporation guilty, the jury could not find him guilty. Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries. *Dunn v. United States*, 284 U. S. 390, 76 L. ed. 356, 52 S. Ct. 189.

And so we are brought to our real problem. The Circuit Court of Appeals, one judge dissenting, reversed the conviction on the ground that only the corporation was the "person" subject to prosecution unless, perchance, Buffalo Pharmacal was a counterfeit corporation serving as a screen for Dotterweich. On that issue, after rehearing, it remanded the cause for a new trial. We then brought the case here, on the Government's petition for certiorari, 318 U. S. 753, because this construction raised questions of importance in the enforcement of the Federal Food, Drug, and Cosmetic Act.

The court below drew its conclusion not from the provisions defining the offenses on which this prosecution was based (§§ 301 (a) and 303 (a)), but from the terms of § 303 (c). That section affords immunity from prosecution if certain conditions are satisfied. The condition relevant to this case is a guaranty from the seller of the innocence of his product. So far as here relevant, the provision for an immunizing guaranty is as follows:

"No person shall be subject to the penalties of subsection (a) of this section . . . (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act . . ."

The Circuit Court of Appeals found it "difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten one." 131 F. 2d 500, 508. And so it cut down the scope of the penalizing provisions of the Act to the restrictive view, as a matter of language and policy, it took of the relieving effect of a guaranty.

The guaranty clause cannot be read in isolation. The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-

protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. See *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 55 L. ed. 364, 31 S. Ct. 361 and *McDermott v. Wisconsin*, 228 U. S. 115, 128, 57 L. ed. 754, 33 S. Ct. 431. The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States v. Balint*, 258 U. S. 250, 66 L. ed. 604, 42 S. Ct. 301. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded (or adulterated), and that the article may be misbranded (or adulterated) without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares . . ." *United States v. Johnson*, 221 U. S. 488, 497-98, 55 L. ed. 823, 31 S. Ct. 627.

The statute makes "any person" who violates § 301 (a) guilty of a "misdemeanor." It specifically defines "person" to include "corporation." § 201 (e). But the only way in which a corporation can act is through the individuals who act on its behalf. *New York Central & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 S. Ct. 304. And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty, *United States v. Mills*, 7 Pet. 138, 141, a doctrine given general application in § 332 of the Penal Code (18 U. S. C. § 550). If, then, Dotterweich is not subject to the Act, it must be solely on the ground that individuals are immune when the "person" who violates § 301 (a) is a corporation, although from the point of view of action the individuals are the corporation. As a matter of legal development, it has taken time to establish criminal liability also for a corporation and not merely for its agents. See *New York Central & H. R. R. Co. v. United States*, *supra*. The history of federal food and drug legislation is a good illustration of the elaborate phrasing that was in earlier days deemed necessary to fasten criminal liability on corporations. Section 12 of the Food and Drugs Act of 1906 provided that, "the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person." By 1938, legal understanding and practice had rendered such statement of the obvious superfluous. Deletion

of words—in the interest of brevity and good draftsmanship³⁵—superfluous for holding a corporation criminally liable can hardly be ground for relieving from such liability the individual agents of the corporation. To hold that the Act of 1938 freed all individuals, except when proprietors, from the culpability under which the earlier legislation had placed them is to defeat the very object of the new Act. Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it. This purpose was unequivocally avowed by the two committees which reported the bills to the Congress. The House Committee reported that the Act “seeks to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906.” (H. Rep. No. 2139, 75th Cong., 3d Sess., p. 1.) And the Senate Committee explicitly pointed out that the new legislation “must not weaken the existing laws,” but on the contrary “it must strengthen and extend that law’s protection of the consumer.” (S. Rep. No. 152, 75th Cong., 1st Sess., p. 1.) If the 1938 Act were construed as it was below, the penalties of the law could be imposed only in the rare case where the corporation is merely an individual’s *alter ego*. Corporations carrying on an illicit trade would be subject only to what the House Committee described as a “license fee for the conduct of an illegitimate business.”³⁶ A corporate officer, who even with “intent to defraud or mislead” (§ 303b), introduced adulterated or misbranded drugs into interstate commerce could not be held culpable for conduct which was indubitably outlawed by the 1906 Act. See, e. g., *United States v. Mayfield*, 177 F. 765. This argument proves too much. It is not credible that Congress should by implication have exonerated what is probably a preponderant number of persons involved in acts of disobedience—for the number of noncorporate proprietors is relatively small. Congress, of course, could reverse the process and hold only the corporation and allow its agents to escape. In very exceptional circumstances it may have required this result. See *Sherman v. United States*, 282 U. S. 25, 75 L. ed. 143, 51 S. Ct. 41. But the history of the present Act, its purposes, its terms, and extended practical construction lead away from such a result once “we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule.” *United*

³⁵ “The bill has been made shorter and less verbose than previous bills. That has been done without deleting any effective provisions.” S. Rep. No. 152, 75th Cong., 1st Sess., p. 2.

³⁶ In describing the penalty provisions of § 303, the House Committee reported that the Bill “increases substantially the criminal penalties * * * which some manufacturers have regarded as substantially a license fee for the conduct of an illegitimate business.” H. Rep. No. 2139, 75th Cong., 3rd Sess., p. 4.

States v. Union Supply Co., 215 U. S. 50, 55, 54 L. ed. 87, 30 S. Ct. 15.

The Act is concerned not with the proprietary relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. If a guaranty immunizes shipments of course it immunizes all involved in the shipment. But simply because if there had been a guaranty it would have been received by the proprietor, whether corporate or individual, as a safeguard for the enterprise, the want of a guaranty does not cut down the scope of responsibility of all who are concerned with transactions forbidden by § 301. To be sure, that casts the risk that there is no guaranty upon all who according to settled doctrines of criminal law are responsible for the commission of a misdemeanor. To read the guaranty section, as did the court below, so as to restrict liability for penalties to the only person who normally would receive a guaranty—the proprietor—disregards the admonition that "the meaning of a sentence is to be felt rather than to be proved." *United States v. Johnson*, 221 U. S. 488, 496, 55 L. ed. 823, 31 S. Ct. 627. It also reads an exception to an important provision safeguarding the public welfare with a liberality which more appropriately belongs to enforcement of the central purpose of the Act.

The Circuit Court of Appeals was evidently tempted to make such a devitalizing use of the guaranty provision through fear that an enforcement of § 301 (a) as written might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment. But that is not the way to read legislation. Literalism and evisceration are equally to be avoided. To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty. Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of con-

sumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers," *Nash v. United States*, 229 U. S. 373, 378, 57 L. ed. 1232, 33 S. Ct. 780, even when the consequences are far more drastic than they are under the provision of law before us. See *United States v. Balint, supra* (involving a maximum sentence of five years). For present purpose it suffices to say that in what the defense characterized as "a very fair charge" the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict.

Reversed.

Mr. Justice MURPHY, dissenting.³⁷

Our prime concern in this case is whether the criminal sanctions of the Federal Food, Drug, and Cosmetic Act of 1938 plainly and unmistakably apply to the respondent in his capacity as a corporate officer. He is charged with violating § 301(a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of any adulterated or misbranded drug. There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.

It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing. It may be proper to charge him with responsibility to the corporation and the stockholders for negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any

³⁷ The selected footnotes in this opinion have been renumbered.

such citizen the legislative mandate must be clear and unambiguous. Accordingly that which Chief Justice Marshall has called "the tenderness of the law for the rights of individuals" entitles each person, regardless of economic or social status, to an unequivocal warning from the legislature as to whether he is within the class of persons subject to vicarious liability. Congress cannot be deemed to have intended to punish anyone who is not "plainly and unmistakably" within the confines of the statute. *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 10 S. Ct. 625; *United States v. Gradwell*, 243 U. S. 476, 485, 61 L. ed. 857, 37 S. Ct. 407.

Moreover, the fact that individual liability of corporate officers may be consistent with the policy and purpose of a public health and welfare measure does not authorize this Court to impose such liability where Congress has not clearly intended or actually done so. Congress alone has the power to define a crime and to specify the offenders. *United States v. Wiltberger*, 5 Wheat. 76, 95. It is not our function to supply any deficiencies in these respects, no matter how grave the consequences. Statutory policy and purpose are not constitutional substitutes for the requirement that the legislature specify with reasonable certainty those individuals it desires to place under the interdict of the Act. *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 S. Ct. 609; *Sarlls v. United States*, 152 U. S. 570, 38 L. ed. 556, 714 S. Ct. 720.

Looking at the language actually used in this statute, we find a complete absence of any reference to corporate officers. There is merely a provision in § 303 (a) to the effect that "any person" inadvertently violating § 301 (a) shall be guilty of a misdemeanor. Section 201 (e) further defines "person" as including an "individual, partnership, corporation, and association."³⁸ The fact that a corporate officer is both a "person" and an "individual" is not indicative of an intent to place vicarious liability on the officer. Such words must be read in light of their statutory environment.³⁹ Only if Congress has otherwise specified

³⁸ The normal and necessary meaning of such a definition of "person" is to distinguish between individual enterprises and those enterprises that are incorporated or operated as a partnership or association, in order to subject them all to the Act. This phrase cannot be considered as an attempt to distinguish between individual officers of a corporation and the corporate entity. *Lee, "Corporate Criminal Liability,"* 28 Col. L. Rev. 1, 181, 190.

³⁹ Compare *United States v. Cooper Corp.*, 312 U. S. 600, 606, 85 L. ed. 1071, 61 S. Ct. 742, and *Davis v. Pringle*, 268 U. S. 315, 318, 69 L. ed. 974, 45 S. Ct. 549, holding that the context and legislative history of the particular statutes there involved indicated that the words "any person" did not include the United States. But in *Georgia v. Evans*, 316 U. S. 159, 86 L. ed. 1346, 62 S. Ct. 972, and *Ohio v. Helvering*, 292 U. S. 360, 78 L. ed. 1307, 54 S. Ct. 725, these considerations led to the conclusion that "any person" did include a state. See also 40 Stat. 1143, which specifically includes officers within the meaning of "any person" as used in the Revenue Act of 1918.

an intent to place corporate officers within the ambit of the Act can they be said to be embraced within the meaning of the words "person" or "individual" as here used.

Nor does the clear imposition of liability on corporations reveal the necessary intent to place criminal sanctions on their officers. A corporation is not the necessary and inevitable equivalent of its officers for all purposes. In many respects it is desirable to distinguish the latter from the corporate entity and to impose liability only on the corporation. In this respect it is significant that this Court has never held the imposition of liability on a corporation sufficient, without more, to extend liability to its officers who have no consciousness of wrongdoing. Indeed, in a closely analogous situation, we have held that the vicarious personal liability of receivers in actual charge and control of a corporation could not be predicated on the statutory liability of a "company," even when the policy and purpose of the enactment were consistent with personal liability. *United States v. Harris, supra*.⁴⁰ It follows that express statutory provisions are necessary to satisfy the requirement that officers as individuals be given clear and unmistakable warning as to their vicarious personal liability. This Act gives no such warning.

This fatal hiatus in the Act is further emphasized by the ability of Congress, demonstrated on many occasions, to apply statutes in no uncertain terms to corporate officers as distinct from corporations.⁴¹ The failure to mention officers specifically

⁴⁰ In that case we had before us Rev. Stat. §§ 4386-4389, which penalized "any company, owner or custodian of such animals" who failed to comply with the statutory requirements as to livestock transportation. A railroad company violated the statute and the government sought to impose liability on the receivers who were in actual charge of the company. It was argued that the word "company" embraced the natural persons acting on behalf of the company and that to hold such officers and receivers liable was within the policy and purpose of so humane a statute. We rejected this contention in language peculiarly appropriate to this case (177 U. S. at 309):

"It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

⁴¹ "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have

is thus some indication of a desire to exempt them from liability. In fact the history of federal food and drug legislation is itself illustrative of this capacity for specification and lends strong support to the conclusion that Congress did not intend to impose liability on corporate officers in this particular Act.

Section 2 of the Federal Food and Drugs Act of 1906, as introduced and passed in the Senate, contained a provision to the effect that any violation of the Act by a corporation should be deemed to be the act of the officer responsible therefor and that such officer might be punished as though it were his personal act.⁴² This clear imposition of criminal responsibility on corporate officers, however, was not carried over into the statute as finally enacted. In its place appeared merely the provision that "when construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation . . . within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such a corporation . . . as well as that of the person."⁴³ This provision had the effect only of making corporations responsible for the illegal acts of their officers and proved unnecessary in view of the clarity of the law to that effect. *New York Central & H. R.R. Co. v. United States*, 212 U. S. 481, 53 L. ed. 613, 29 S. Ct. 304.

The framers of the 1938 Act were aware that the 1906 Act was deficient in that it failed "to place responsibility properly upon corporate officers."⁴⁴ In order "to provide the additional scope necessary to prevent the use of the corporate form as a

authorized, ordered, or done any of the acts constituting in whole or in part such violation." 15 U. S. C. § 24.

"The courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to * * * (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act." 30 Stat. 545.

"Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the next preceding section of this chapter shall be liable to a penalty * * *" 45 U. S. C. § 63.

"A mortgagor who, with intent to defraud, violates any provision of subsection F, section 924, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor * * *" 46 U. S. C. § 941 (b).

⁴² S. 88, 59th Cong., 1st Sess. Senator Heyburn, one of the sponsors of S. 88, stated that this was "a new feature in bills of this kind. It was intended to obviate the possibility of escape by the officers of a corporation under a plea, which has been more than once made, that they did not know that this was being done on the credit of or on the responsibility of the corporation." 40 Cong. Rec. 894.

⁴³ 34 Stat. 772, 21 U. S. C. § 4.

⁴⁴ Senate Report No. 493, 73d Cong., 2d Sess., p. 21.

shield to individual wrongdoers,"⁴⁵ these framers inserted a clear provision that "whenever a corporation or association violates any of the provisions of this Act, such violation shall also be deemed to be a violation of the individual directors, officers, or agents of such corporation or association who authorized, ordered, or did any of the acts constituting, in whole or in part, such violation."⁴⁶ This paragraph, however, was deleted from the final version of the Act.

We cannot presume that this omission was inadvertent on the part of Congress. *United States v. Harris*, *supra* at 309. Even if it were, courts have no power to remedy so serious a defect, no matter how probable it otherwise may appear that Congress intended to include officers; "probability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, *supra* at 105. But the framers of the 1938 Act had an intelligent comprehension of the inadequacies of the 1906 Act and of the unsettled state of the law. They recognized the necessity of inserting clear and unmistakable language in order to impose liability on corporate officers. It is thus unreasonable to assume that the omission of such language was due to a belief that the Act as it now stands was sufficient to impose liability on corporate officers. Such deliberate deletion is consistent only with an intent to allow such officers to remain free from criminal liability. Thus to apply the sanctions of this Act to the respondent would be contrary to the intent of Congress as expressed in the statutory language and in the legislative history.

The dangers inherent in any attempt to create liability without express Congressional intention or authorization are illustrated by this case. Without any legislative guides, we are confronted with the problem of determining precisely which officers, employees and agents of a corporation are to be subject to this

⁴⁵ *Ibid.*, p. 22. This report also stated that "it is not, however, the purpose of this paragraph to subject to liability those directors, officers, and employees, who merely authorize their subordinates to perform lawful duties and such subordinates, on their own initiative, perform those duties in a manner which violates the provisions of the law. However, if a director or officer personally orders his subordinate to do an act in violation of the law, there is no reason why he should be shielded from personal responsibility merely because the act was done by another and on behalf of a corporation."

⁴⁶ This provision appears in several of the early versions of the Act introduced in Congress. S. 1944, 73d Cong., 1st Sess., § 18(b); S. 2000 73d Cong., 2d Sess., § 18(b); S. 2800, 73d Cong., 2d Sess., § 18(b); S. 5, 74th Cong., 1st Sess., § 709(b); S. 5, 74th Cong., 2d Sess., § 707(b), as reported to the House, which substituted the word "personally" for the word "authorized" in the last clause of the paragraph quoted above. A variation of this provision appeared in S. 5, 75th Cong., 1st Sess., § 2(f), and made a marked distinction between the use of the word "person" and the words "director, officer, employee, or agent acting for or employed by any person." All of these bills also contained the present definition of "person" as including "individual, partnership, corporation, and association."

Act by our fiat. To erect standards of responsibility is a difficult legislative task and the opinion of this Court admits that it is "too treacherous" and a "mischievous futility" for us to engage in such pursuits. But the only alternative is a blind resort to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." Yet that situation is precisely what our constitutional system sought to avoid. Reliance on the legislature to define crimes and criminals distinguishes our form of jurisprudence from certain less desirable ones. The legislative power to restrain the liberty and to imperil the good reputation of citizens must not rest upon the variable attitudes and opinions of those charged with the duties of interpreting and enforcing the mandates of the law. I therefore cannot approve the decision of the Court in this case.

Mr. Justice ROBERTS, Mr. Justice REED and Mr. Justice RUTLEDGE join in this dissent.

UNITED STATES v. WALSH, TRADING AS
KELP LABORATORIES⁴⁷

Supreme Court of the United States, 1947.
331 U. S. 432, 91 L. ed. 1585, 67 S. Ct. 1283.

Mr. Justice MURPHY delivered the opinion of the court.

This appeal brings before us § 301 (h) of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 1042, 21 U. S. C. § 331 (h) which prohibits the giving of a false guaranty that any food, drug, device or cosmetic is not adulterated or misbranded within the meaning of the Act.

Appellee does business in San Diego, California, under the name of Kelp Laboratories. An information has been filed, charging appellee with having given a false guaranty in violation of § 301 (h). The following facts have been alleged: In February, 1943, appellee gave a continuing guaranty to Richard Harrison Products, of Hollywood, California, stating that no products thereafter shipped to the latter would be adulterated or misbranded within the meaning of the Act. On February 24, 1945, while the guaranty was in full force and effect, appellee consigned to Richard Harrison Products, at Hollywood, a shipment of vitamin products which were allegedly adulterated and misbranded—thereby making the guaranty false in respect of that shipment. Prior and subsequent to the date of the shipment, Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of the vitamin product supplied by appellee.

Appellee moved to dismiss the information on the ground that it did not state an offense. The argument was that § 301 (h) applies only to a guaranty that is false relative to an interstate

⁴⁷ The footnotes have been omitted.

shipment, whereas the alleged shipment here was to a consignee within California, the state of origin, and there was no allegation that the consignee purchased the order for some one outside California or that it intended to sell the products in its interstate rather than its intrastate business. The District Court gave an oral opinion sustaining appellee's contention and granting the motion to dismiss. The case is here on direct appeal by the United States.

The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. Article 1, § 8, ch. 3. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. *United States v. Dotterweich*, 320 U. S. 277, 280, 88 L. ed. 48, 64 S. Ct. 134. It is in the interstate setting that the various sections of the Act must be viewed.

But § 301(h), with which we are concerned, does not speak specifically in interstate terms. It prohibits the "giving of a guaranty or undertaking referred to in section 303(c) (2), which guaranty or undertaking is false," the only exception being as to a false guaranty given by a person who, in turn, relied upon a similar guaranty given by the person from whom he received in good faith the adulterated or misbranded article. Nothing on the face of the section limits its application to guaranties relating to articles introduced or delivered for introduction into interstate commerce. From all that appears, its proscription plainly extends to the giving of any false statutory guaranty, without regard to the interstate or intrastate character of the shipment in question, to those who are engaged in the business of making interstate shipments.

Nor do we find any interstate limitation of the type which appellee proposes in the reference made in § 301(h), to § 303(c) (2). That reference is made simply to define the type of guaranty or undertaking the falsification of which is prohibited by § 301(h). Instead of spelling out the matter, § 301(h) adopts the reference in § 303(c) (2) to "a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect * * * that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act." The fact that § 303(c) (2) relieves a holder of such a guaranty from the criminal penalties provided by § 303(a) for violating § 301(a) does not carry over the interstate limitation of § 301(a) to § 301(h). Section 301(a) prohibits the introduction or delivery for introduction into interstate commerce of illicit articles and § 303(c) (2) relieves one from the liabilities of such introduction if one has a guar-

anty or undertaking as therein described. Section 301(h) has adopted that description for the entirely different purpose of informing persons what kind of a guaranty or undertaking may not be given falsely. In other words, § 301(a) is directed to illegal interstate shipments, while § 301(h) is directed to the giving of false guaranties. Guaranties as described in § 303(c) (2) may be used by interstate dealers in connection with either interstate or intrastate shipments and those guaranties that are false are outlawed by § 301(h).

It is true, of course, that the guaranty referred to in § 303(c) (2) is one given for the purpose of protecting the dealer "in case of an alleged violation of section 301 (a)," thereby relieving him of liability if he reships adulterated or misbranded goods in interstate commerce. But where such a guaranty, as in this case, is given to a dealer regularly engaged in making interstate shipments and who may therefore have need of the guaranty, § 301(h) imposes liability on the guarantor if that guaranty turns out to be false. And that liability attaches even where the particular shipment which renders the guaranty false is not alleged to have been an interstate one.

It is significant that § 301(h) had no counterpart in the predecessor statute, the Food and Drugs Act of 1906, 34 Stat. 768. Under § 9 of that Act, a dealer could not be prosecuted for shipping adulterated or misbranded articles in interstate commerce if he had a guaranty of a type similar to that referred to in the present statute. If there were such a guaranty, the guarantor was subject to the penalties which would otherwise attach to the dealer. The result was that the guarantor was not liable on account of a false guaranty unless the dealer had shipped the prohibited article in interstate commerce. *Steinhardt Bros. & Co. v. United States*, 191 F. 798, 800; *United States v. Charles L. Heinle Specialty Co.*, 175 F. 299, 300, 301. There was no liability for issuing a false guaranty as such to one engaged in an interstate business. But in the 1938 Act, Congress added a new liability in the form of § 301(h), making the guarantor liable for giving a false guaranty of the type referred to in § 303(c) (2). We find it impossible to say that the framers of the 1938 Act added § 301(h) for the useless purpose of achieving the same result as had been reached under the 1906 Act without such a provision.

We thus conclude that § 301(h) definitely proscribes the giving of a false guaranty to one engaged wholly or partly in an interstate business irrespective of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. Such a construction is entirely consistent with the interstate setting of the Act. A manufacturer or processor ordinarily has no way of knowing whether a dealer, whose business

includes making interstate sales, will redistribute a particular shipment in interstate or intrastate commerce. But if he guarantees that his product is not adulterated or misbranded within the meaning of the Act, he clearly intends to assure the dealer that the latter may redistribute the product in interstate commerce without incurring any of the liabilities of the Act. And the dealer is thereby more likely to engage in interstate distribution without making an independent check of the product. The possibility that a false guaranty may give rise to an illegal interstate shipment by such a dealer is strong enough to make reasonable the prohibition of all false guaranties to him, even though some of them may actually result only in intrastate distribution. By this means, some of the evils which Congress sought to eliminate are cut down at their source and the effectiveness of the Act's enforcement is greatly enhanced.

So construed, § 301 (h) raises no constitutional difficulties. The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is the case.

The judgment of the District Court is accordingly reversed.

Mr. Justice JACKSON, dissenting.

Stretch the Food and Drugs Act as we will, I cannot make it cover this charge as a crime. The statutory scheme is to make a crime of "The introduction or delivery for introduction into interstate commerce" of adulterated or misbranded goods. * * * [§ 301(a) and (d)]

But since many shippers buy goods of others and do not know their precise ingredients, Congress allowed an escape for the violator, provided he acted in good faith and could trace the responsibility to another. This he must do by producing a signed guaranty or undertaking, and the statute requires that it shall be conditioned "to the effect, in case of an *alleged violation* of * * * [§ 301(a)] that such article is not adulterated or misbranded * * * or to the effect, in case of an *alleged violation* of * * * [§ 301(d)], that such article is not an article" forbidden shipment by stated paragraphs of the Act. (Emphasis added.) * * * [§ 303(c)]

It will be noticed that Congress not only provided but repeated that the statutory bond required is "in case of an *alleged violation*" by introducing or delivering for introduction of goods in interstate commerce. No such violation has been alleged here;

these goods were never introduced or delivered for introduction into interstate commerce. But the Court seems to think it is enough that there are some grounds for expecting that this crime possibly, or probably, or perhaps pretty certainly, would eventually be committed.

Of course, if the assured had committed this offense and had fallen back on the guarantor, the statute which reached the assured would not be sufficient. To punish the responsible person, it was made a crime to give a false guaranty "referred to in" the statute. * * * [§ 301 (h)]

The Government now seeks to exact criminal responsibility on a guarantee, expressly conditioned only "in case of violation," in a case of no violation. Until a violation is alleged, the guaranty plays no statutory role at all. It might afford a cause of action if false, but that is quite different from making it a crime. For it is no guaranty at all for criminal prosecution purposes if violation of neither * * * [§ 301 (a) nor 301 (d)] is alleged. The statute requires such violation to be alleged only, not proved, in order to put the guarantor rather than the assured to the proof. This is the only instance I recall where the guarantor is liable when there is no breach of the condition of the bond. The whole plan was to have a substituted liability in case the violator of the Act became such in good faith. This decision makes a new, independent and original liability where there has been no alleged violation by moving the goods in interstate commerce.

I do not think we should take such liberties in expanding criminal statutes in which the sovereign once was considered under a duty to be explicit and the subject entitled to the doubt.

SULLIVAN v. UNITED STATES⁴⁸

Circuit Court of Appeals, Fifth Circuit, 1947.
161 F. 2d 629

SIBLEY, Circuit Judge. Sullivan, a local retail merchant in Columbus, Georgia, was convicted under the Federal Food, Drug, and Cosmetics Act, 52 Stat. 1040, Secs. 301(c) and (k), 21 U. S. C. A. § 331(c) and (k), for selling to two federal inspectors two lots of 12 tablets each of sulfathiazole taken from a bottle on the shelves of his drug store which had contained 1,000 tablets. The facts as alleged in the information and stipulated or proven on the trial are these: Between Nov. 25, 1943, and March 15, 1944, Abbott Laboratories, doing business in North Chicago, Illinois, shipped in interstate commerce to Abbott Laboratories, at Atlanta, Georgia, a number of boxes containing bottles of drugs, one of them being this bottle of

⁴⁸ The footnotes have been omitted.

1,000 tablets of sulfathiazole, which was duly labeled as such, with a caution that they are to be used only by or on the prescription of a physician, and with the name and Chicago address of Abbott Laboratories. This bottle so labeled was on Sept. 29, 1944, in Atlanta sold to Sullivan, and by him transferred in intrastate commerce to his pharmacy in Columbus, and placed on his shelves for retail sales to customers. On Dec. 13, 1944, the two lots of 12 tablets each were taken from the bottle, placed in pasteboard pill boxes, with only the word sulfathiazole (slightly misspelled) on them, and sold to the federal inspectors. A motion to dismiss the information as not charging a federal crime, and one for a judgment of acquittal because none was proved, were overruled and this appeal taken.

The general constitutionality of the federal Act under the commerce clause of the Constitution is admitted. The contentions are that the Act is not intended to operate on retail sales over the counter after interstate commerce has ended, by one who was not the importer; that the language is not clear enough to make criminals of such sellers; and that if construed to apply to them the Act is to that extent beyond the power of Congress.

It will be noted that the only interstate commerce here involved is the transportation of bottles of drugs in boxes from Chicago to Atlanta at least nine months before the sales here in question. The boxes came to rest in Atlanta and were opened by the importer, Abbott Laboratories, and the bottles were put in their stock of drugs in Atlanta for sale. Over six months thereafter Sullivan bought one bottle, which is conceded to have been duly labeled, and put it into his stock of drugs at Columbus for retail sales, where the bottle stayed for three more months. If the criminal provisions relied on apply here, they apply to all intrastate sales of imported drugs after any number of intermediate sales within the State and after any lapse of time; and not only to such sales of drugs, but also to similar retail sales of foods, devices and cosmetics, for all these are equally covered by these provisions of the Act. We are not able to conclude that the Act is to be so construed as to bring within these penal provisions most of the sales in all drug stores, beauty parlors, barber shops and retail grocery stores in the United States.

The general purpose of the Act is declared in its simple title: "An Act to prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices, cosmetics, and for other purposes." Section 301(c) prohibits, (under penalty by Section 303), "The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise." Sullivan clearly did not receive in interstate commerce any misbranded drug, nor did he proffer delivery of any

in interstate commerce. A moderately strict construction of this penal provision would confine it to shippers and to importers in interstate commerce, and proffers of sale by the latter. Sullivan was a party to intrastate sales only. Moreover since this bottle was at all times duly labeled and not misbranded, no one violated this provision by receiving or proffering delivery of it.

Section 301(k) prohibits "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." The labeling here was not removed or mutilated; but an act was done with respect to the drug, to wit, the removal of some of it from the labeled bottle and placing of it in a box not sufficiently labeled under the Act, after shipment in interstate commerce and while the drug was held for sale, so that this portion of the drug became misbranded. Therefore in their broadest possible sense these words may include what happened. But we are of opinion that they ought not to be taken so broadly, but held to apply only to the holding for the first sale by the importer after interstate shipment. Since importation by merchants of all merchandise is for the very purpose of sale, the importation, as has always been held, remains incomplete till its purpose is thus realized. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. The words of subsection (k), "held for sale after shipment in interstate commerce", naturally refer to this first sale by the merchant importer. It was this sale which was involved in *McDermott v. Wisconsin*, 228 U. S. 115, 33 S. Ct. 431, 57 L. ed. 754, 47 L. R. A., N. S., 984, Ann. Cas. 1915A, 39, and in *Baldwin v. Seelig*, 294 U. S. 511, 55 S. Ct. 497, 79 L. ed. 1032, 101 A. L. R. 55, much relied on by the government. We do not doubt, however, that the United States can prohibit the destruction of the labeling under which interstate commerce occurred, by any one at any time, in order to preserve the evidence of what was done during the interstate movement, as is fairly held in the *McDermott* case cited; but here this evidence was never meddled with, but went unaltered into the hands of the inspectors, and it shows a correct labeling. These main provisions of subsection (k) were fully complied with. The attempt here made is to extend subsection (k) so as to make criminal all retail sales from the interstate package, though made clearly in intrastate commerce, unless the label on the interstate package which has been broken be reproduced on the retail package. We believe no grocer or druggist thus breaking an interstate package for a retail sale has understood this was necessary, and it is said this case is the first effort to apply the federal Act in this way. If the "holding

for sale" is held to refer to all would-be sellers, no matter where or when or in what quantities, of all foods and drugs and cosmetics which at some time had moved in interstate commerce, the field of enforcement of the Act will be multiplied many times. The reason urged for so expanding it, to wit, the protection of ultimate consumers, only makes another difficulty; for while Congress may regulate interstate commerce to any extent and almost for any purpose it thinks proper, this extended application would be really a direct regulation for police purposes of what is plainly intrastate commerce, which is the peculiar province of the State.

* * *

In passing this Act Congress in its title indicated that its main and direct concern was with "the movement in interstate commerce." Until that movement is complete and the importer has sold his original packages the State cannot interfere. Congress regulated what the Constitution directly authorizes. There is no indication of any intention to regulate intrastate commerce because of any burdensome effect on interstate commerce. The talismanic expression "Affecting interstate commerce" is not used, as in the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., passed shortly before. In interpreting and applying those words in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 30, 57 S. Ct. 615, at page 621, 81 L. ed. 893, 108 A. L. R. 1352, the court was careful to point out the rule of construction of statutes that a construction will not be adopted that is of doubtful constitutionality, in this very matter of federal intrusion upon the domain of the States, saying: "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. . . ." Also in *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 61 S. Ct. 580, 583, 85 L. ed. 881, we read: "The construction of § 5 [15 U. S. C. A. § 45] urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. * * * An inroad upon local conditions and local standards of such far-reaching import as involved here, ought to await a clearer mandate from Congress." Much more ought unambiguous and clear words to be required when statutes creating criminal offenses are for construction. *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *United States v. Harris*, 177 U. S. 305, 20 S. Ct. 609, 44 L. ed. 780; *Kraus v. United States*, 327 U. S. 614, 66 S. Ct. 705. 780.

The purpose of this Act being to regulate "movement in inter-

state commerce" of foods, drugs and cosmetics, and the general purpose of subsection (k) being to prohibit mutilation of the labeling on the packages which so moved, we do not find the proposed application of the ejusdem generis words "Any other act" plain enough to make criminals of retail grocers and druggists who did not import but who break and sell intrastate from the imported packages without mutilating the labeling. We thus find it unnecessary to determine the constitutionality of the federal regulation of intrastate sales as here contended for, by denying that doubtful construction.

The judgment is reversed with direction to acquit the defendant below.

Judgment reversed.

UNITED STATES v. SULLIVAN

Supreme Court of the United States, 1948.
332 U. S. 689, 92 L. ed. 297, 68 S. Ct. 331

Mr. Justice BLACK. * * * Respondent, a retail druggist in Columbus, Georgia, was charged in two counts of an information with a violation of § 301(k) of the Federal Food, Drug, and Cosmetic Act of 1938. That section prohibits "the doing of any * * * act with respect to a * * * drug * * * if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."⁴⁰ Section 502(f) of the Act declares a drug "to be misbranded * * * unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use * * * dangerous to health, or against unsafe dosage * * * as are necessary for the protection of users." The information charged specifically that the respondent had performed certain acts which resulted in sulfathiazole being "misbranded" while "held for sale after shipment in interstate commerce."

The facts alleged were these: A laboratory had shipped in interstate commerce from Chicago, Illinois, to a consignee at Atlanta, Georgia, a number of bottles, each containing 1,000 sulfathiazole tablets. These bottles had labels affixed to them, which, as required by § 502(f) (1) and (2) of the Act, set out adequate directions for the use of the tablets and adequate warnings to protect ultimate consumers from dangers incident to

⁴⁰ "Sec. 301. The following acts and the causing thereof are hereby prohibited: * * *

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." 52 Stat. 1040, 1042, 675, 21 U. S. C. §331(k).

this use.⁵⁰ Respondent bought one of these properly labeled bottles of sulfathiazole tablets from the Atlanta consignee, transferred it to his Columbus, Georgia, drugstore, and there held the tablets for resale. On two separate occasions twelve tablets were removed from the properly labeled and branded bottle, placed in pill boxes, and sold to customers. These boxes were labeled "sulfathiazole." They did not contain the statutorily required adequate directions for use or warnings of danger.

Respondent's motion to dismiss the information was overruled, a jury was waived, evidence was heard, and respondent was convicted under both counts. D. C., 67 F. Supp. 192.

The Circuit Court of Appeals reversed. 161 F. 2d 629, 630. The court thought that as a result of respondent's action the sulfathiazole became "misbranded" within the meaning of the Federal Act, and that in its "broadest possible sense" the Act's language "may include what happened." However, it was also of the opinion that the Act ought not to be taken so broadly "but held to apply only to the holding for the first sale by the importer after interstate shipment." Thus the Circuit Court of Appeals interpreted the statutory language of § 301(k) "while such article is held for sale after shipment in interstate commerce" as though Congress had said "while such article is held for sale by a person who had himself received it by way of a shipment in interstate commerce." We granted certiorari to review this important question concerning the Act's coverage.

First. The narrow construction given § 301(k) rested not so much upon its language as upon the Circuit Court's view of the consequences that might result from the broader interpretation urged by the Government. The court pointed out that the retail sales here involved were made in Columbus nine months after this sulfathiazole had been shipped from Chicago to Atlanta. It was impressed by the fact that, if the statutory language "while such article is held for sale after shipment in interstate commerce" should be given its literal meaning, the criminal provisions relied on would "apply to all intrastate sales of imported drugs after any number of intermediate sales within the State and after any lapse of time; and not only to such

⁵⁰ The following inscription appeared on the bottle labels as a compliance with § 502(f) (1) which requires directions as to use: "Caution.—To be used only by or on the prescription of a physician." This would appear to constitute adequate directions since it is required by regulation issued by the Administrator pursuant to authority of the Act. 21 C. F. R. Cum. Supp. § 2.106(b) (3). The following appeared on the label of the bottles as a compliance with § 502(f) (2) which requires warnings of danger: "Warning.—In some individuals Sulfathiazole may cause severe toxic reactions. Daily blood counts for evidence of anemia or leukopenia, and urine examinations for hematuria are recommended."

"Physicians should familiarize themselves with the use of this product before it is administered. A circular giving full directions and contraindications will be furnished upon request."

sales of drugs, but also to similar retail sales of foods, devices and cosmetics, for all these are equally covered by these provisions of the Act." The court emphasized that such consequences would result in far-reaching inroads upon customary control by local authorities of traditionally local activities, and that a purpose to afford local retail purchasers federal protection from harmful foods, drugs and cosmetics should not be ascribed to Congress in the absence of an exceptionally clear mandate, citing *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 61 S. Ct. 580, 85 L. ed. 881. Another reason of the court for refraining from construing the Act as applicable to articles misbranded while held for retail sale, even though the articles had previously been shipped in interstate commerce, was its opinion that such a construction would raise grave doubts as to the Act's constitutionality. In support of this position the court cited *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30, 57 S. Ct. 615, 620, 81 L. ed. 893, 108 A. L. R. 1352; and *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, 97 A. L. R. 947.

A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity. Although criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see *M. Kraus & Bros., Inc. v. United States*, 327 U. S. 614, 621, 622, 66 S. Ct. 705, 707, 708, 90 L. ed. 894, even in determining whether such statutes meet that test, they should be given their fair meaning in accord with the evident intent of Congress. *United States v. Raynor*, 302 U. S. 540, 552, 58 S. Ct. 353, 358, 82 L. ed. 413.

Second. Another consideration that moved the Circuit Court of Appeals to give the statute a narrow construction was its belief that the holding in this case with reference to misbranding of drugs by a retail druggist would necessarily apply also to "similar retail sales of foods, devices and cosmetics, for all these," the court said, "are equally covered by these provisions of the Act." And in this Court the effect of such a possible coverage of the Act is graphically magnified. We are told that its application to these local sales of sulfathiazole would logically

require all retail grocers and beauty parlor operators to reproduce the bulk container labels on each individual item when it is taken from the container to sell to a purchaser. It is even prophesied that, if § 301(k) is given the interpretation urged by the Government, it will later be applied so as to require retail merchants to label sticks of candy and sardines when removed from their containers for sale.

The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its different misbranding provisions which relate to food, cosmetics, and the like. There will be opportunity enough to consider such contingencies should they ever arise. It may now be noted, however, that the Administrator of the Act is given rather broad discretion—broad enough undoubtedly to enable him to perform his duties fairly without wasting his efforts on what may be no more than technical infractions of law. As an illustration of the Administrator's discretion, § 306 permits him to excuse minor violations with a warning if he believes that the public interest will thereby be adequately served. And the Administrator is given extensive authority under §§ 405, 503 and 603 to issue regulations exempting from the labeling requirements many articles that otherwise would fall within this portion of the Act. The provisions of § 405 with regard to food apparently are broad enough to permit the relaxation of some of the labeling requirements which might otherwise impose a burden on retailers out of proportion to their value to the consumer.

Third. When we seek the meaning of § 301(k) from its language we find that the offense it creates and which is here charged requires the doing of some act with respect to a drug (1) which results in its being misbranded, (2) while the article is held for sale "after shipment in interstate commerce." Respondent has not seriously contended that the "misbranded" portion of § 301(k) is ambiguous. Section 502(f), as has been seen, provides that a drug is misbranded unless the labeling contains adequate directions and adequate warnings. The labeling here did not contain the information which § 502(f) requires. There is a suggestion here that, although alteration, mutilation, destruction, or obliteration of the bottle label would have been a "misbranding," transferring the pills to non-branded boxes would not have been, so long as the labeling on the empty bottle was not disturbed. Such an argument cannot be sustained. For the chief purpose of forbidding the destruction of the label is to keep it intact for the information and protection of the consumer. That purpose would be frustrated when the pills the consumer buys are not labeled as required, whether the label has been torn from the original container or the pills have been

transferred from it to a non-labeled one. We find no ambiguity in the misbranding language of the Act.

Furthermore, it would require great ingenuity to discover ambiguity in the additional requirement of § 301(k) that the misbranding occur "while such article is held for sale after shipment in interstate commerce." The words accurately describe respondent's conduct here. He held the drugs for sale after they had been shipped in interstate commerce from Chicago to Atlanta. It is true that respondent bought them nine months after the interstate shipment had been completed by their delivery to another consignee. But the language used by Congress broadly and unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment. Accordingly we find that the conduct of the respondent falls within the literal language of § 301(k).

Fourth. Given the meaning that we have found the literal language of § 301(k) to have, it is thoroughly consistent with the general aims and purposes of the Act. For the Act as a whole was designed primarily to protect consumers from dangerous products. This Court so recognized in *United States v. Dotterweich*, 320, U. S. 277, 282, 64 S. Ct. 134, 137, 88 L. ed. 48, after reviewing the House and Senate Committee Reports on the bill that became law. Its purpose was to safeguard the consumer by applying the Act to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer. Section 301(a) forbids the "introduction or delivery for introduction into interstate commerce" of misbranded or adulterated drugs; § 301(b) forbids the misbranding or adulteration of drugs while "in interstate commerce"; and § 301(c) prohibits the "receipt in interstate commerce" of any misbranded or adulterated drug, and "the delivery or proffered delivery thereof for pay or otherwise." But these three paragraphs alone would not supply protection all the way to the consumer. The words of paragraph (k) "while such article is held for sale after shipment in interstate commerce" apparently were designed to fill this gap and to extend the Act's coverage to every article that had gone through interstate commerce until it finally reached the ultimate consumer. Doubtless it was this purpose to insure federal protection until the very moment the articles passed into the hands of the consumer by way of an intrastate transaction that moved the House Committee on Interstate and Foreign Commerce to report on this section of the Act as follows: "In order to extend the protection of consumers contemplated by the law to the full extent

constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment."⁵¹ We hold that § 301 (k) prohibits the misbranding charged in the information.

* * * *

Reversed.

Mr. Justice RUTLEDGE, concurring.

This case has been presented as if the Federal Food, Drug, and Cosmetic Act of 1938 had posed an inescapable dilemma. It is said that we must either (1) ignore Congress' obvious intention to protect ultimate consumers of drugs through labeling requirements literally and plainly made applicable to the sales in this case or (2) make criminal every corner grocer who takes a stick of candy from a properly labeled container and sells it to a child without wrapping it in a similar label.

The trouble-making factor is not found in the statute's provisions relating specifically to drugs. Those provisions taken by themselves are clear and unequivocal in the expressed purpose to protect the ultimate consumer by the labeling requirements. So is the legislative history. Standing alone, therefore, the drug provisions would cover this case without room for serious question.

However, those provisions do not stand entirely separate and independent in the Act's structure. In some respects, particularly in § 301 (k), they are interlaced with provisions affecting food and cosmetics. And from this fact is drawn the conclusion that this decision necessarily will control future decisions concerning those very different commodities.

If the statute as written required this, furnishing no substantial basis for differentiating such cases, the decision here would be more difficult than I conceive it to be. But I do not think the statute has laid the trap with which we are said to be faced. Only an oversimplified view of its terms and effects could produce that result.

The Act is long and complicated. Its numerous provisions treat the very different subjects of drugs, food and cosmetics alike in some respects, differently in others. The differences are as important as the similarities, and cannot be ignored. More is necessary for construction of the statute than looking merely to the terms of §§ 301 (k) and 502 (f).

It is true that § 301 (k) deals indiscriminately with food, drugs, devices and cosmetics, on the surface of its terms alone. Hence it is said that the transfer of sulfathiazole, a highly dangerous drug, from a bulk container to a small box for retail sale, could not be "any other act" unless a similar transfer of

⁵¹ H. Rep. 2139, 75th Cong., 3d Sess., 3.

candies, usually harmless, also would be "any other act." From this hypothesis it is then concluded that the phrase must be interpreted with reference to the particularities which precede it, namely, "alteration, mutilation, destruction, obliteration or removal" of any part of the label, and must be limited by those particularities.

That construction almost, if not quite, removes "any other act" from the section. And by doing so it goes far to emasculate the section's effective enforcement, especially in relation to drugs. Any dealer holding drugs for sale after shipment in interstate commerce could avoid the statute's effect simply by leaving the label intact, removing the contents from the bulk container, and selling them, however deadly, in broken parcels without label or warning.

I do not think Congress meant the phrase to be so disastrously limited. For the "doing of any other act with respect to a food, drug, device, or cosmetic" is prohibited by § 301(k) only "if such act * * * results in such article being misbranded." And the statute provides, not a single common definition of misbranding for foods, drugs and cosmetics, but separate and differing sections on misbranded foods, misbranded drugs and devices, and misbranded cosmetics. §§ 403, 502, 602.

The term "misbranded" as used in § 301(k) therefore is not one of uniform connotation. On the contrary, its meaning is variable in relation to the different commodities and the sections defining their misbranding. So also necessarily is the meaning of "any other act," which produces those misbranding consequences. Each of the three sections therefore must be taken into account in determining the meaning and intended scope of application for § 301(k) in relation to the specific type of commodity involved in the particular sale, if Congress' will is not to be overridden by broadside generalization glossed upon the statute. As might have been expected, Congress did not lump food, drugs and cosmetics in one indiscriminate hopper for the purpose of applying § 301(k), either in respect to misbranding or as to "any other act" which produces that consequence. Brief reference to the several misbranding sections incorporated by reference in § 301(k) substantiates this conclusion.

The three sections contain some common provisions.⁵² But the fact that each section is also different from the other two in important respects indicates that each broad subdivision of the Act presents different problems of interpretation. Neither the misbranded foods section nor the misbranded cosmetics section contains any provision directly comparable to § 502(f), which the respondent here has violated. That section, however, is to be contrasted with § 403(k), one of the subsections deal-

⁵² E. g., §§ 403(a), 502(a) and 602(a) are in identical language.

ing with misbranded foods. Comparison of the two provisions indicates that the doing of a particular act with respect to a drug may result in misbranding, whereas the same method of selling food would be proper.

Section 502(f) provides that a drug shall be deemed to be misbranded:

"Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

This provision, dealing with directions for use and warnings against improper use, in terms is designed "for the protection of users." To be effective, this protection requires regulation of the label which the container bears when the drug reaches the ultimate consumer.⁵³ The legislative history leaves no doubt that the draftsmen and sponsors realized the importance of having dangerous drugs properly labeled at the time of use, not just at the time of sale.⁵⁴ The intent to protect the public health is further emphasized by the limited scope of the proviso, which directs the Administrator to make exemptions only when compliance with clause (1) "is not necessary for the protection of the public health."

Section 403(k), which contains the principal basis for "making every retail grocer a criminal," is very different. By its terms food is deemed to be misbranded:

"If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: Provided, That to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Administrator. The provisions of this paragraph and paragraphs (g) and (i) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream."

The section, in contrast to § 502(f)'s comprehensive coverage of drugs, applies not to all foods shipped interstate, but only to the restricted classes containing artificial flavoring, or coloring, or chemical preservatives. The labeling requirement is much simpler. And the proviso confers a much broader power of exemption upon the Administrator than does the proviso of

⁵³ See S. Rep. No. 361, 74th Cong., 1st Sess. 19.

⁵⁴ See H. R. Rep. No. 2139, 75th Cong., 3d Sess. 8.

§ 502(f). Under the latter he is given no power to exempt on the ground that compliance is impracticable. He cannot weigh business convenience against protection of the public health. Only where he finds that labeling is not necessary to that protection is he authorized to create an exemption for drugs and devices. Health security is not only the first, it is the exclusive, criterion.

Under § 403(k), however, in dealing with foods the Administrator can dispense with labels much more broadly. In terms the criterion for his action becomes "the extent that compliance * * * is impracticable" rather than, as under § 502(f), "where any requirement of clause (1) (adequate directions for use) * * * is not necessary for the protection of the public health." Practical considerations affecting the burden of compliance by manufacturers and retailers, irrelevant under § 502(f), become controlling under § 403(k). Thus under the statute's intent a much more rigid and invariable compliance with the labeling requirements for drugs is contemplated than for those with foods, apart from its greatly narrower coverage of the latter. And the difficulty of compliance with those requirements for such articles as candies explains the difference in the two provisos.⁵⁵

These differences, and particularly the differences in the provisos, have a direct and an intended relation to the problem of enforcement. The labeling requirements for foods are given much narrower and more selective scope for application than those for drugs, a difference magnified by the conversely differing room allowed for exemptions. What is perhaps equally important, the provisos are relevant to enforcement beyond specific action taken by the Administrator to create exemptions.

His duty under both sections is cast in mandatory terms. Whether or not he can be forced by mandamus to act in certain situations, his failure to act in some would seem to be clearly in violation of his duty. Obviously there must be many more instances where compliance with the labeling requirements for foods will be "impracticable" than where compliance with the very different requirements for drugs will not be "necessary for the protection of the public health." That difference is obvious-

⁵⁵ "The proviso of this paragraph likewise requires the establishment of regulations exempting packages of assorted foods from the naming of ingredients or from their appearance in the order of predominance by weight where, under good manufacturing practice, label declaration of such information is impracticable. This provision will be particularly applicable, for example, to assorted confections, which under normal manufacturing practices may vary from package to package not only with respect to identity of ingredients but also in regard to the relative proportions of such ingredients as are common to all packages." S. Rep. No. 493, 73d Cong., 2d Sess. 12. The proviso discussed is in § 403(i), not in § 403(k); but the discussion brings out the sort of considerations which require exemption when compliance is impracticable.

ly important for enforcement, particularly by criminal prosecution. I think it is one which courts are entitled to take into account when called upon to punish violations. The authors of the legislation recognized expressly that "technical, innocent violations * * * will frequently arise." S. Rep. No. 152, 75th Cong., 1st Sess. 4. In other words, there will be conduct which may be prohibited by the Act's literal wording, but which nevertheless should be immune to prosecution.

When that situation arises, as it often may with reference to foods, by virtue of the Administrator's failure to discharge his duty to create exemptions before the dealer's questioned action takes place, that failure in my judgment is a matter for the court's consideration in determining whether prosecution should proceed. Whenever it is made to appear that the violation is a "technical, innocent" one, an act for which the Administrator should have made exemption as required by § 403(k), the prosecution should be stopped. This Court has not hesitated to direct retroactive administrative determination of private rights when that unusual course seemed to it the appropriate solution for their determination. *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 64 S. Ct. 1215, 88 L. ed. 1488, 153 A. L. R. 1007. If that is permissible in civil litigation, there is much greater reason for the analogous step of taking into account in a criminal prosecution an administrative officer's failure to act when the commanded action, if taken, would have made prosecution impossible.

It is clear therefore that the corner grocer occupies no such position of jeopardy under this legislation as the druggist and that the meaning of § 301(k) is not identical for the two, either as to what amounts to misbranding or as to what is "the doing of any * * * act" creating that result. The supposed dilemma is false. Congress had power to impose the drug restrictions, they are clearly applicable to this case, the decision does not rule the corner grocer selling candy, and the judgment should be reversed. I therefore join in the Court's judgment and opinion to that effect.

Mr. Justice FRANKFURTER, dissenting.

If it takes nine pages to determine the scope of a statute, its meaning can hardly be so clear that he who runs may read, or that even he who reads may read. Generalities regarding the effect to be given to the "clear meaning" of a statute do not make the meaning of a particular statute "clear." The Court's opinion barely faces what, on the balance of considerations, seems to me to be the controlling difficulty in its rendering of § 301(k) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1042, 21 U. S. C. § 331(k), 21 U. S. C. A. § 331(k). That

section no doubt relates to articles "held for sale after shipment in interstate commerce and results in such article being misbranded." But an article is "misbranded" only if there is "alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic." Here there was no "alteration, mutilation, destruction, obliteration, or removal" of any part of the label. The decisive question is whether taking a unit from a container and putting it in a bag, whether it be food, drug or cosmetic, is doing "any other act" in the context in which that phrase is used in the setting of the Federal Food, Drug, and Cosmetic Act and particularly of § 301(k).⁵⁶

As bearing upon the appropriate answer to this question, it cannot be that a transfer from a jar, the bulk container, to a small paper bag, without transferring the label of the jar to the paper bag, is "any other act" when applied to a drug, but not "any other act" when applied to candies or cosmetics. Before we reach the possible discretion that may be exercised in prosecuting a certain conduct, it must be determined whether there is anything to prosecute. Therefore, it cannot be put off to some other day to determine whether "any other act" in § 301(k) applies to the ordinary retail sale of candies or cosmetics in every drug store or grocery throughout the land, and so places every corner grocery and drug store under the hazard that the Administrator may report such conduct for prosecution. That question is now here. It is part of this very case, for the simple reason that the prohibited conduct of § 301(k) applies with equal force, through the same phrase, to food, drugs and cosmetics insofar as they are required to be labeled. See §§ 403, 502, and 602 of the Act.

It is this inescapable conjunction of food, drugs and cosmetics in the prohibition of § 301(k) that calls for a consideration of the phrase "or the doing of any other act," in the context of the rest of the sentence and with due regard for the important fact that the States are also deeply concerned with the protection of the health and welfare of their citizens on transactions peculiarly within local enforcing powers. So considered, "the doing of any other act" should be read with the meaning which radiates to that loose phrase from the particularities that precede it, namely "alteration, mutilation, destruction, obliteration or removal" of any part of the label. To disregard all these considerations and then find "a clear meaning" is to reach

⁵⁶ "The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."

a sum by omitting figures to be added. There is nothing in the legislative history of the Act, including the excerpt from the Committee Report on which reliance is placed, to give the slightest basis for inferring that Congress contemplated what the Court now finds in the statute. The statute in its entirety was of course intended to protect the ultimate consumer. This is no more true in regard to the requirements pertaining to drugs than of those pertaining to food. As to the reach of the statute—the means by which its ultimate purpose is to be achieved—the legislative history sheds precisely the same light on the provisions pertaining to food as on the provisions pertaining to drugs. If differentiations are to be made in the enforcement of the Act and in the meaning which the ordinary person is to derive from the Act, such differentiations are interpolations of construction. They are not expressions by Congress.

In the light of this approach to the problem of construction presented by this Act, I would affirm the judgment below.

Mr. Justice REED and Mr. Justice JACKSON join in this dissent.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

No. 11249

THE UNITED STATES OF AMERICA,

Libellant-Appellant,

v.

PHELPS DODGE MERCANTILE COMPANY,

Claimant-Appellee,

and

150 Cartons, More or Less, Each Containing 10 Pounds of an article labeled in part: "American Beauty Brand High Grade Cut Spaghetti,"

and

25 Cartons, More or Less, Each Containing 10 Pounds of An Article Labeled in Part: "American Beauty Brand High Grade Short Cut Macaroni," Respondents.

Appeal from the District Court of the United States
for the District of Arizona

APPELLANT'S BRIEF

Statement of Pleadings and Facts

A libel of information was filed by the United States in the District Court of the United States for the District of Arizona

pursuant to Section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 334(a) ; 5 F. C. A., Title 21, § 334(a)), for the seizure and condemnation of 150 cartons of spaghetti and 25 cartons of macaroni which had been shipped in interstate commerce from Denver, Colorado, to the Phelps Dodge Mercantile Company at Douglas, Arizona. The libel, as amended, alleges that this food is adulterated within the meaning of 21 U. S. C. 342(a) (3), 5 F. C. A., Title 21, § 342(a), in that it consists wholly or in part of a filthy substance by reason of the presence therein of insect fragments, rodent hairs, and rodent excreta, and is adulterated under 21 U. S. C. 342(a) (4), (5 F. C. A., Title 21, § 342(a) (4)), in that it has been held at the warehouse of Phelps Dodge Mercantile Company in Douglas, Arizona, under insanitary conditions whereby it has been contaminated with filth while in the original packages (R. 9-10).

The Phelps Dodge Mercantile Company appeared in the action as claimant and filed an exception to the amended libel, asserting that the libel fails to show that the food therein described was adulterated when introduced into or while in interstate commerce, as required by 21 U. S. C. 334(a) (R. 12), (5 F. C. A., Title 21, § 334(a)). The District Court ruled that the food was not adulterated while in interstate commerce, sustained claimant's exception, and entered a decree dismissing the libel and directing that the merchandise be released to the claimant (R. 14-15). Subsequently, the District Court vacated a stay of execution which had been obtained by the Government, except as to ten cartons (R. 20-21).

This Court has authority to review the District Court's decision under 28 U. S. C. 225(a) and (d) [§§ 1291, 1294 of U. S. C. Title 28, 1948 Revision].

Statement of the Case

The facts in this case are not in dispute. The cartons of spaghetti and macaroni under seizure were shipped from Denver, Colorado, to the claimant, Phelps Dodge Mercantile Company, at Douglas, Arizona, and were stored by it at its warehouse there under insanitary conditions. While the food was thus stored by the interstate consignee in the original packages, it became contaminated with filth—e. g., rodent hairs, rodent excreta, and insect fragments.

Under these circumstances, the District Court ruled that the adulteration of the food had not occurred while the food was in interstate commerce.

Question Involved

Is food adulterated "while in interstate commerce" within the meaning of Section 304(a) of the Federal Food, Drug, and

Cosmetic Act (21 U. S. C. 334(a) ; 5 F. C. A., Title 21, § 334(a)), if it becomes contaminated with filth after interstate transportation while being stored under insanitary conditions in original packages at the warehouse of the consignee?

Specification of Errors

1. The District Court erred in concluding as a matter of law that since the respondents, the spaghetti and macaroni seized, had not become adulterated until after the completion of their interstate shipment although while still in their original packages, they were not adulterated "while in interstate commerce" within the meaning of 21 U. S. C. 334(a), (5 F. C. A., Title 21, § 334(a)).

2. The District Court erred in finding and determining that because the respondents, the spaghetti and macaroni seized, had not become adulterated until the completion of their interstate shipment although in their original packages, they were not subject to condemnation under 21 U. S. C. 334(a), (5 F. C. A., Title 21, § 334(a)).

3. The District Court erred in allowing claimant's exception to the amended libel and in dismissing the amended libel.

Argument

This case raises a fundamental jurisdictional question in the enforcement of the Federal Food, Drug, and Cosmetic Act—e. g., is the Act applicable to food which becomes adulterated after interstate shipment while still in the original packages? The importance of this question will appear more clearly later in this brief when it is shown that practically every inspection and seizure of adulterated food of necessity takes place after transportation.

* * *

[Ed. That portion of the brief which deals with the constitutional power of Congress to direct the condemnation of food after interstate shipment is omitted.]

II

Congress, in the Federal Food, Drug, and Cosmetic Act of 1938 has exercised its power to regulate interstate commerce so as to bring within the purview of the statute food which, after interstate shipment, becomes adulterated while in its original package in the hands of its consignee.

A. Interstate commerce provisions of the Food and Drugs Act of 1906.—It is the position of the Government that the Federal Food, Drug, and Cosmetic Act of 1938 authorizes seizure

and condemnation in situations such as the present one. In large measure, this position is predicated upon the language and construction of the Food and Drugs Act of 1906 (21 U. S. C. 1 (1934 ed.)), which was the predecessor of the Act of 1938. We turn first, therefore, to a consideration of the relevant provisions of the 1906 statute:

21 U. S. C. 14 (1934 ed.) Any article of food * * * that is adulterated * * * and is being transported from one State * * * to another * * * , or, having been transported, remains unloaded, unsold, or in original unbroken packages * * * shall be liable to be proceeded against * * * .

Under this provision, an article, to be subject to condemnation, had to be adulterated at the time of seizure. In the only judicial expression on this point of which we are aware, handed down early in the enforcement of the Act of 1906, it was held that a drug which was adulterated while being transported from one State to another but which was no longer adulterated at the time of seizure, was not subject to condemnation. *United States v. Five Boxes of Asafoetida*, 181 F. 561 (E. D. Pa).⁵⁷

But on page 568, the Court said:

There is no seizure of a drug that "was" adulterated authorized. Having been transported and remaining unloaded, unsold, or in original unbroken packages, it can only be forfeited when it "is" adulterated and misbranded when seized.

While this statement was not made with reference to the question now under consideration but rather to the converse of that question, it clearly suggests that goods in original packages could be seized and condemned after interstate shipment, if adulterated *at that time*, regardless of their condition prior thereto.

This section, as construed and enforced by the Department of Agriculture for the life of the Act of 1906, 32 years, was divided into its component parts to read:

Any article of food that is adulterated and is being transported from one State to another shall be liable to be proceeded against * * * . Any article of food that is adulterated and, *having been transported from one State to another*, remains unloaded, unsold, or in original unbroken packages, shall be liable to be proceeded against * * * [Italics added.]

⁵⁷ The restrictive effect of this decision was eliminated by the Act of 1938, which provides that merchandise, adulterated or misbranded when introduced into or while in interstate commerce, shall be liable to be proceeded against "while in interstate commerce, or at any time thereafter." [Italics added.] 21 U. S. C. 334(a), (5 F. C. A., Title 21, § 334(a)).

By the terms of that statute, Federal jurisdiction did not attach unless the article was being transported interstate or had been so transported. However, the element of transportation was independent of the element of adulteration. The italicized words "having been transported from one State to another" were parenthetical, spelling out a condition precedent to the right of the Federal Government to seize goods that are adulterated and remain unloaded, unsold, or in original unbroken packages. Consequently, goods that remained in original unbroken packages after their interstate journey and were adulterated at the time of seizure, were subjected to seizure and condemnation regardless of whether they were adulterated when transported.⁵⁵

An important Supreme Court pronouncement with respect to the Food and Drugs Act of 1906 appears in the dissenting opinion of Mr. Justice Holmes in *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529. The majority opinion was recently expressly overruled by an unanimous court in *United States v. Darby*, 312 U. S. 100, 85 L. ed. 609, 61 S. Ct. 451, where, on page 115, the Court referred to "the powerful and now classic dissent of Mr. Justice Holmes." In that dissent, Mr. Justice Holmes stated on pages 279 and 280:

The Pure Food and Drug Act which was sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed.

⁵⁵ Recent substantiation of this construction appears in proposed legislation now pending in Congress to replace the Insecticide Act of 1910. That Act contains a seizure provision almost identical with the seizure provision of the Food and Drugs Act of 1906:

7 U. S. C. 133: "Any insecticide * * * that is adulterated or misbranded * * * and is being transported from one State * * * to another, or, having been transported, remains unloaded, unsold, or in original unbroken packages * * * shall be liable to be proceeded against * * *"

The bill which Congress is now considering (H. R. 5645, 79th Cong., 2d Sess.) to replace the Insecticide Act of 1910, contains a seizure provision which reads:

Section 9a: "Any economic poison or device that is being transported from one State * * * to another, or, having been transported, remains unsold or in original unbroken packages * * * shall be liable to be proceeded against * * *"

"1. in the case of an economic poison—

"(a) if it *is* adulterated or misbranded." [Italics added.]

The Committee report accompanying this bill (H. R. Rep. No. 1887, 79th Cong., 2d Sess., p. 6) includes this statement:

"Section 9: The seizure provisions contained in this bill are substantially similar to the present act."

As the provision is set up in this bill, it unequivocally confirms the Government's long standing interpretation of the comparable provision in the Food and Drugs Act of 1906—e.g., that goods which (1) *have been transported* from one State to another, (2) *are* in original unbroken packages, and (3) *are* adulterated or misbranded, may be proceeded against.

Legislative construction of a statute, as evidenced in subsequent legislation in *pari materia*, may properly be examined as an aid in the construction of that statute. *United States v. Freeman*, 3 How. 556, 564-5; *Swigart v. Baker*, 229 U. S. 187, 197, 57 L. ed. 1143, 33 S. Ct. 645; *First National Bank v. Missouri*, 263 U. S. 640, 658, 68 L. ed. 486, 44 S. Ct. 213.

364, 31 S. Ct. 364, with the intimation that "no trade can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618, 62 L. ed. 513, 38 S. Ct. 219. *It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil.* [Italics added.]

Here Mr. Justice Holmes gave recognition to the proposition that, in the Food and Drugs Act of 1906, Congress had not confined its regulation of interstate commerce in misbranded and adulterated food and drug products to the period of transportation alone, but properly struck at evils intimately associated with such commerce though they might arise either prior or subsequent to the transportation.

B. Administrative interpretation of the acts of 1906 and 1938—Since the enactment of the Federal Food, Drug, and Cosmetic Act of 1938, the Department of Agriculture and the Federal Security Agency⁵⁹ have carried over the administrative interpretation of the 1906 statute into the enforcement of the Act of 1938. Between 1906 and 1946, many thousands of default decrees of condemnation have been entered by the courts with respect to goods which were adulterated in their original packages at the time of seizure and probably became adulterated after interstate movement. The instant case is the first in 40 years in which a court has ruled upon the propriety of effecting such seizures.

A clear statement of the practice of the Food and Drug Administration of instituting seizures where goods had become adulterated in the possession of consignees was made in 1930 by Mr. Walter G. Campbell, then Chief of the Food and Drug Administration, at hearings before the Senate Committee on Agriculture and Forestry which was then considering certain phases of the administration of the Food and Drugs Act. (71st Cong., 2d Sess.) The following facts appear in the printed report of the proceedings: that anaesthetic ether, even though held under most favorable conditions, would deteriorate and decompose and form aldehydes and other peroxides which may render the product injurious to health (p. 369); that it was impossible to reach any conclusion as to when these harmful ingredients would

⁵⁹ By Reorganization Plan No. IV, Sec. 12, 5 U. S. C. following 133t (2 F. C. A., Title 5, § 133t note), the administration of the 1938 Act was transferred, in 1940, to the Federal Security Agency.

develop (p. 369); and that the cause of deterioration was unknown (p. 371). Mr. Campbell stated that criminal prosecution could not be instituted against the shipper for shipping adulterated ether because it was not in violation of the law when shipped. He testified, however, with respect to libel for condemnation proceedings:

(P. 369) We made the seizures without knowledge of when such adulterated condition had occurred.

(P. 371) Now, we found that *the development of aldehydes and peroxides was an occurrence that took place usually, if not in every single instance, some time after the product had been shipped into interstate commerce.* Ordinarily the ether that was sent out by the manufacturer at the time of its entry into interstate commerce was free from aldehydes and peroxides. It was not in violation of law at that time. And I am bringing that up at this point not to answer definitely the charge that has been magnified to the effect that we have never instituted a criminal prosecution on the basis of violation of law for the shipment of ether. We have never had the evidence to show an offense. *We could not from the collection of samples which have been held at a hospital or at some distributing depot or at some drug warehouse for some time prove beyond a reasonable doubt, as we would be required to prove, that non-U. S. P. condition existed at the time that the product was shipped or offered for shipment into interstate commerce.* [Italics added.] (P. 372) We have a specific duty that we recognize and undertake to meet, to keep off the market ethers in which aldehyde and peroxide may be found * * *

At pp. 406-407-408, the discussion related to a seizure of 27,000 pounds of impure ether seized in New Jersey in 1929. The ether had been purchased by an individual from the Army. The owner was not offering the product for sale on the market and it was being held in the same shape in which it had been manufactured. Seizure was instituted against the entire lot. Mr. Campbell stated (p. 408):

That was the only instance where other than the manufacturer of the ether appeared as claimant in the *great many cases where shipments were seized. In all the instances that I know of where the product had been shipped by the manufacturer there was no evidence to show that it was not U. S. P. at the time of shipment* * * *. The perishable character of the product was responsible for *the deterioration that occurred after shipment into interstate commerce had been made.* [Italics added.]

Senator Royal S. Copeland, who later introduced the bill which was subsequently enacted as the Federal Food, Drug, and Cosmetic Act, though not a member of the committee referred to

above, took an active part in these hearings. Of the 18 members of the committee 9 were members of the Senate in 1938 when the Federal Food, Drug, and Cosmetic Act was passed.⁶⁰

The annual reports of the Food and Drug Administration are replete with references to this interpretation of the Act of 1906. In the report for the fiscal year 1931 reference was made (p. 17) to the continued regulatory work against impure anaesthetic ether, and again note was made of its tendency to develop aldehydes and peroxides "while the ether is in storage."

The report for the fiscal year 1937 refers (p. 13) to 34 samples of ether which were from consignments shipped a year or more before sampling and which could have deteriorated after transportation. The report for the fiscal year 1938 makes this statement, on page 10:

Objectionable candy *subject to the law* may be found in any one of three categories: (1) *Material that was sound when shipped but through improper storage became contaminated in the consignee's possession* * * * [Italics added.]

Similar statements appear specifically in the reports issued after the enactment of the act of 1938. Thus, the annual report for the fiscal year 1940 contains the following statement (p. 10):

The last two annual reports discussed the campaign against filthy candy launched during the fiscal year 1938. Regulatory operations were then directed mainly toward the removal from the market of confectionery which had become infested in the hands of dealers at destination points, generally due to too long storage or storage under adverse conditions. The effect of that campaign is reflected in a great reduction of seizures of storage-infested candy. * * *

One hundred and five consignments of insect-infested flour were seized, as compared with 205 seizures during the previous year. The millers continued the practice of making smaller-lot shipments in a serious effort to avoid an accumulation of flour in dealers' hands and in warehouses, where infestation is likely to occur; particularly in areas where hot, damp weather prevails.

And in the annual report for the fiscal year 1945, the following statements are made (pp. 20, 21):

The breakdown of normal sanitary controls in the food-manufacturing plants, and especially in storage warehouses, is the most serious feature of the domestic food supply. * * *

Regulatory work on terminally infested foods is designed not only to remove particular lots of filthy foods from con-

⁶⁰ Senators Charles L. McNary, George W. Norris, Arthur Capper, Lynn J. Frazier, John G. Townsend, Jr., Ellison D. Smith, Burton K. Wheeler, Elmer Thomas, Henrik Shipstead.

sumer channels, but to bring about a long-range correction of unsatisfactory storage in order to save from future destruction by rodents and insects many times the quantity of food involved in the original seizure.

To the same effect are the annual reports for the fiscal year ending 1941 (p. 7); 1942-1943 combined reports (pp. 20-21); 1944 (p. 12).

The present Commissioner of Food and Drugs, Dr. Paul B. Dunbar, recently appeared before a Congressional Appropriations Committee and described in some detail the current activities of the Food and Drug Administration with respect to food held in storage warehouses under insanitary conditions after interstate shipment. (Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 79th Cong., 1st Sess. on the Department of Labor-Federal Security Agency Appropriation Bill for 1946, Part 2, pages 102-106.) A few excerpts from Dr. Dunbar's testimony follow:

(Page 102): Now, I think without a question the most serious feature of the domestic food supply right now is the break-down of the sanitary controls in manufacturing plants and, *especially, in storage warehouses* that do exist in normal times but which have been allowed to lapse through carelessness or shortage of employees. [Italics added.]

(Page 103): One of the pathetic things about this is that a material portion of these foods that we seize leave the factory in a clean and wholesome state, and at some stage in the shipment from manufacturer to ultimate consumer they are stored under conditions whereby they were exposed to rodents and insects and become utterly filthy.

* * *

(Page 103): Mr. Engel. What are some of your other large seizures besides flour?

Mr. Dunbar. Answering your question, I was just about, at this point, to show you some exhibits, and these are not posed photographs * * *

* * *

(Page 104): Here is a most striking exhibit. This represents 142 70-pound cheeses, probably as good cheese as anybody would want to eat when it came out of the plant. *This was stored in a southern warehouse.* [Italics added.]

The inspector went into that warehouse—here is one of the cheeses (indicating) and there appear to be some shreds of paper on top of that cheese. Now, turn over the page there and you will see what the inspector discovered after he pulled off that paper.

Do you recognize it? *That is a nest of baby rats, nesting right in that perfectly good Wisconsin cheese—do you gentlemen want me to delete the State?* [Italics added.]

Mr. Keefe. No sir; the cheese was all right when it left, but after it got down South, they let the rats get into it.

Significantly, the Appropriations Committee recommended, and Congress enacted, an increase of over \$250,000 for the Food and Drug Administration for the current fiscal year, the Committee's report stating that *"This agency is doing some of the most important work performed by the Government for its citizens. In addition actually to removing from channels of commerce impure and contaminated food and drugs, much research has and is being done along lines most beneficial to improving the health of the Nation."* H. R. Rep. No. 551, 79th Cong., 1st Sess., p. 10. [Italics added.]

It is highly significant, we urge, that an examination of the voluminous hearings and debates that took place, and the numerous committee reports which were issued, during the five years (1933-1938) leading to the enactment of the Act of 1938, reveals not one suggestion of disapproval, by either Congress or the industries concerned, of the long-standing administrative practice. Yet, the legislative history of the Act discloses most forcefully that those administrative practices which had arisen with respect to the Food and Drugs Act of 1906 and as to which either Congress or the industries concerned had any question whatsoever, were discussed and debated in the minutest detail.

Since Congress was in many ways apprised of this enforcement policy of the Food and Drug Administration, the administrative construction of the Act of 1906 together with the judicial decrees of default condemnation thereunder may well be deemed to have had legislative approval by the enactment of the Act of 1938, designed as that Act was to retain and strengthen the best features of the predecessor statute and to furnish added safeguards for the protection of the public. *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459, 77 L. ed. 893, 53 S. Ct. 435; *Koshland v. Helvering*, 298 U. S. 441, 80 L. ed. 1268, 56 S. Ct. 767; *Nagel v. Loi Hoa*, 275 U. S. 475, 481, 72 L. ed. 381, 748 S. Ct. 160. See, also, *Bowles v. Wheeler*, 152 F. (2d) 34, 38 (C. C. A. 9).

Moreover, the long-established practice of the Food and Drug Administration, to which public expression has been given repeatedly, is entitled to great weight in construing the statute. In *United States v. Jackson*, 280 U. S. 183, 74 L. ed. 361, 50 S. Ct. 143, the Court stated at page 193:

* * * great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration * * * ; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

C. **Interstate commerce provisions of the Federal Food, Drug and Cosmetic Act of 1938.**—As indicated, the Federal Food, Drug and Cosmetic Act of 1938 is an exertion of the power of Congress to regulate commerce. The spaghetti and macaroni proceeded against in this case were seized under a provision of that Act, 21 U. S. C. 334(a), (5 F. C. A., Title 21, § 334(a)), which states in part:

Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or *while in interstate commerce* * * * shall be liable to be proceeded against *while in interstate commerce* * * * .”
[Italics added.]

* * *

The District Court ruled that the goods under seizure, having become contaminated in the warehouse of the consignee while in the original packages after the completion of their interstate shipment, were not adulterated “while in interstate commerce” as that term is used in 21 U. S. C. 334(a), quoted above. It is our contention that that term encompasses the factual situation here presented. Consequently, this appeal hinges upon the meaning of the words “while in interstate commerce.”

The breadth of this term is suggested by the statutory definition of “interstate commerce”:

21 U. S. C. 321(b), (5 F. C. A., Title 21, § 321(b)): The term “interstate commerce” means (1) *commerce* between any State or Territory and any place outside thereof * * *
[Italics added.]

We believe it significant that the definition uses the word “commerce,” since that word appears in Article I, Section 8, Clause 3 of the Constitution, vesting Congress with the power “To regulate *Commerce* with foreign Nations, and among the several States, and with the Indian Tribes.” [Italics added.] For this reason, it may be stated that the term “interstate commerce” as defined in the statute is coextensive with the Constitutional grant of power to Congress. See *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 78, 76 L. ed. 173, 52 S. Ct. 59, where the Court said: “Commerce covers the whole field of which transportation is only a part.”

The practical effect of this broad statutory definition must be determined, of course, by the language of those provisions of the Act which invoke this term as a jurisdictional basis for enforcement proceedings. In the instant case, that language is “while in interstate commerce.”

In seeking to ascertain the scope of that term, we have reviewed briefly the comparable provisions of the Food and Drugs Act of 1906, predecessor of the present statute, and the en-

forcement policies developed thereunder. It is believed that this historical background is important since it reveals (1) a well-established administrative practice of effecting seizure and condemnation of goods which become adulterated while in original packages after having been transported interstate, and (2) statutory authority in the Act of 1906 for such action.

We think it is clear that the Act of 1938 was intended to be broad enough to cover at least the jurisdictional area encompassed by the 1906 statute. The legislative history of the present Act contains numerous expressions of Congressional intention to retain the salutary features of the 1906 statute and to broaden its coverage. As stated in H. R. Rep. No. 2139, 75th Cong., 3rd Sess., p. 1 (Dunn, "Federal Food, Drug, and Cosmetic Act," p. 815), with respect to S. 5, which finally became law:

This act seeks to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act * * *. While the old law has been of incalculable benefit to American consumers, it contains serious loopholes and is not sufficiently broad in its scope to meet the requirements of consumer protection under modern conditions.

The design of Congress to broaden the scope of the 1906 Act was recently recognized by the Supreme Court in *United States v. Dotterweich*, 320 U. S. 277, 280, 282, 88 L. ed. 48, 64 S. Ct. 134, as follows:

The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. *By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience.*

* * *

The House Committee reported that the Act [of 1938] "seeks to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906." (H. R. Rep. No. 2139, 75th Cong., 3rd Sess., p. 1) And the Senate Committee explicitly pointed out that *the new legislation "must not weaken the existing laws," but on the contrary "it must strengthen and extend that law's protection of the consumer."* (S. Rep. No. 152, 75th Cong., 1st Sess., p. 1.) [Italics added.]

Note, also, *United States v. Two Bags * * * Poppy Seeds*, 147 F. (2d) 123, 127 (C. C. A. 6): Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 1, accompanying S. 5 (Dunn. p. 237).

It is well settled, of course, that "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod v. Threlkeld*, 319 U. S.

491, 495. It appears to be the view of the Supreme Court that each Congressional enactment regulating commerce is *sui-generis* and must be analyzed and interpreted independently of other statutes to determine the extent to which Congress has chosen to exercise its power over commerce. The Court has refused to formulate intransigent rules, and has preferred to treat each case upon the basis of the facts involved and to determine the particular question by the process of judicial inclusion and exclusion. Important factors are "the larger considerations of national policy, legislative history, and administrative practicalities." *Kirschbaum Co. v. Walling*, 316 U. S. 517, 523, 86 L. ed. 1638, 62 S. Ct. 1116. The Court stated in that case, at page 520:

The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what is taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. * * *

The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration.

We have already adverted to the language and administrative interpretation of the 1906 statute. A comparative appraisal of the condemnation provisions of the earlier Act (21 U. S. C. 14 (1934 ed.)) and of the 1938 Act (21 U. S. C. 334(a); 5 F. C. A., Title 21, § 334(a)) shows that the latter statute, unlike the predecessor Act, does not spell out the specific points of time when adulterated and misbranded products may be seized. Instead of referring to "while being transported from one State to another" and "having been transported, remains unloaded, unsold, or in original unbroken packages," the Act of 1938 authorized seizure "at any time thereafter" of goods that are adulterated or misbranded "while in interstate commerce." Certainly, the difference in the pertinent language is not without significance. It is apparent that there was a definite Congressional design to extend the area of jurisdiction. To ignore the changes

made by Congress in the applicable sections is to render a conscious and deliberate change of statutory language virtually meaningless, particularly in view of the express legislative purpose in enacting the 1938 Act to strengthen food and drug regulation. The scope of the 1938 Act was pointed out by Mr. Campbell, then Chief of the Food and Drug Administration, in testifying at the Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st Sess., on H. R. 6906, H. R. 8805, H. R. 8941, and S. 5, p. 85, (Dunn, pp. 1261-1262). The following colloquy took place between Congressman Cole and Mr. Campbell:

Mr. Cole. It would not cover, then, things which are purely local?

Mr. Campbell. That is quite right. The things that are produced purely locally—and that is my understanding of what it is intended to do—would not be affected.

Mr. Cole. After the original package gets into the State, it is subject to State law then.

Mr. Campbell. It is subject to State law, but it is likewise subject to Federal law. In other words, there is Federal jurisdiction coextensive with State jurisdiction in such matters. The Supreme Court decided in the Hipolite case that the terms of the Federal law followed the product to the shelf of the retail dealer.

We have already quoted from 21 U. S. C. 334(a), (5 F. C. A., Title 21, § 334(a)). For the purposes of the instant action, the section might read "Any article of food, drug, device, or cosmetic while in interstate commerce that is adulterated or misbranded * * * shall be liable to be proceeded against while in interstate commerce * * * ." That was substantially the wording of the first four bills introduced in Congress. Thus, Section 16(a) of the first bill, S. 1944, 73rd Cong., 1st Sess. (Dunn, p. 45), provided that "Any article of food, drug, or cosmetic in interstate commerce that is adulterated or misbranded * * * shall be liable to be proceeded against while in interstate commerce or at any time thereafter * * * ." The same provision was contained in Section 16(a) of S. 2000, 73rd Cong., 2d Sess. (Dunn, p. 61), Sec. 16(a) of S. 2800, 73rd Cong., 2d Sess. (Dunn, pp. 80-81), and Section 711(a) of S. 5, 74th Cong., 1st Sess. (Dunn, pp. 205-206). The present language of 21 U. S. C. 334(a) appeared for the first time in S. 5, 75th Cong., 1st Sess., which ultimately became law, but, as stated, the difference in language made no change in substance. It will be seen, therefore, that the Act is directed to adulterated products that are "in interstate commerce," not which are being transported in interstate commerce in an adulterated or misbranded condition. The breadth of this language, and its obvious purport to reach

not merely goods which are being *shipped* in interstate commerce in an adulterated or misbranded state, but products in that condition which *are in the channels of interstate commerce*, are set forth in Sen. Rep. No. 493, 73rd Cong., 2d Sess., p. 19, accompanying S. 2800 (Dunn. p. 128), as follows:

Section 10 of the Food and Drugs Act provides for the seizure by a process of libel for condemnation of adulterated or misbranded food and drugs found *in the channels of interstate commerce*. Paragraph (a) of section 16 would continue in effect this form of remedial action against adulterated or misbranded food, drugs, or cosmetics. [Italics added.]

To the same effect is Sen. Rep. No. 361, 74th Cong., 1st Sess., accompanying S. 5 (Dunn, p. 263).

The design of Congress to cover a wider area of jurisdiction in the Act than merely that contained in an actual transportation of debased merchandise is also gathered from the scope of 21 U. S. C. 373 and 374, (5 F. C. A., Title 21, §§ 373, 374) with respect to examining records of interstate shipment and making factory inspections. The former section provides that not only carriers, but persons receiving foods and drugs in interstate commerce or holding such articles so received, shall, upon request of a duly designated employee of the Federal Security Administrator, permit such employee to have access to and to copy all records showing the movement in interstate commerce of the product or the holding thereof, during or after such movement. And 21 U. S. C. 374 (5 F. C. A., Title 21, § 374) declares that employees of the Federal Security Administrator, after obtaining permission of the owner, operator, or custodian thereof, are authorized to enter and inspect factories, warehouses, or establishments in which foods and drugs are manufactured, processed, packed, or held, for introduction into interstate commerce, or are held after such introduction, etc. These provisions, which authorize federal inspection at points of destination, must be considered as giving implementing effect to the broad authority of 21 U. S. C. 334(a), (5 F. C. A., Title 21, § 334(a)) to seize and condemn articles adulterated or misbranded "while in interstate commerce," i. e. while in the channels of interstate commerce.

The changes made in the statutory language would appear to reveal a Congressional design to widen, rather than narrow, the ambit of the exercise of the power granted to Congress by the Constitution over interstate commerce. These changes are particularly significant when the purposes of food and drug legislation are considered. As stated by the Supreme Court in *United States v. Antikamnia Chemical Co.*, 231 U. S. 654, 667, 58 L. ed. 419, 34 S. Ct. 222, "The purpose of the law is the ever insistent

consideration in its interpretation." From the facts surrounding the history of food and drug regulation, and an analysis of the provisions of the 1938 Act and the administrative interpretation given to it and the predecessor statute, viewed in the light of the breadth of the power conferred upon Congress to regulate interstate commerce, the only conclusion reasonably to be drawn is that food of the type involved in this action falls within the purview of the authority exercised by Congress in the Federal Food, Drug, and Cosmetic Act. Particularly would this seem to be true in view of the fact that the remedial purposes of food and drug legislation have caused the courts to declare with unanimity that a broad and liberal construction should be given to its terms. *United States v. Research Laboratories, Inc.*, 126 F. (2d) 42, 45 (C. C. A. 9), cert. denied 317 U. S. 656; *Arner Co. v. United States*, 142 F. (2d) 730, 736 (C. C. A. 1), cert. denied 323 U. S. 730; *United States v. 62 Packages * * * Marmola Prescription Tablets*, 48 F. Supp. 878, 887 (D. Wis.), aff'd 142 F. (2d) 107 (C. C. A. 7), cert. denied 323 U. S. 731. In view of the obvious purpose of the Act, to protect the public health, the rationale followed by the Supreme Court in *Southern Railway Co. v. United States*, 222 U. S. 20, 25-26, 56 L. ed. 72, 32 S. Ct. 2, would seem to be quite applicable. In that case, the question was whether the Safety Appliance Act applied to three cars which were moving only in intrastate traffic. In holding that the statute did apply, the Court stated, in part:

As between the two opposing views, one rejecting the words "on any railroad engaged" in the first clause and the other treating the third clause as redundant, the latter is to be preferred, first, because it is in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective, and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in the process of adoption * * * , thus making it certain that without them the act would not express the will of Congress.

We have pointed out the purposes of the Act and the intention of Congress therein evidenced. We urge that, considering the policy of the legislation as a whole, the reasons for its enactment, and its antecedent history, a construction of the Act should be adopted which will give effect to its evident design to protect the public health and well-being. See *Ozawa v. United States*, 260 U. S. 178, 194, 67 L. ed. 199, 43 S. Ct. 65; *Bernier v. Bernier*, 147 U. S. 242, 246, 37 L. ed. 152, 13 S. Ct. 244; *United States v. Stone & Downer Co.*, 274 U. S. 225, 239; *United States v. American Trucking Associations*, 310 U. S. 534, 542-543, 84 L. ed.

1345, 60 S. Ct. 1059; *Rhodes v. Iowa*, 170 U. S. 412, 422, 42 L. ed. 1088, 18 S. Ct. 664. As stated by the Supreme Court in *United States v. Dotterweich*, 320 U. S. 277, 280, 88 L. ed. 48, 64 S. Ct. 134, with respect to the prosecution of a corporate officer under the Federal Food, Drug, and Cosmetic Act:

The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. *Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of Government and not merely as a collection of English words.* [Italics added.]

D. Practical considerations.—The practical reasons for the assertion by Congress of its power over interstate commerce in foods, drugs, devices, and cosmetics to the extent here urged are apparent when the problems facing the Government in enforcement are viewed. The vast quantity of commodities that is subject to the Act of 1938 as a result of having been introduced in interstate commerce through interstate transportation and importation from foreign countries,⁶¹ and the relatively small number of inspectors,⁶² make it inevitable that the bulk of Federal inspection activities take place after merchandise has been transported interstate and while it is being stored at warehouses or similar establishments pending further processing or disposition to consumers.

Obviously, the Government cannot hope to inspect and analyze every shipment. Sampling and analysis are geared to a carefully selected program which emphasizes those commodities and areas where violation is most likely to occur. Even within these restrictions the field is extremely broad.

If inspection and analysis reveal that food stored in warehouses in the original packages after interstate shipment has been contaminated with filth, it would put an almost impossible burden upon the Government to prove in each of these thousands of cases⁶³ that the adulteration took place before or during shipment rather than at the point of destination. The practical necessities of the situation was recognized by the Supreme Court even under the predecessor Food and Drugs Act of 1906. Thus, in *McDermott v. Wisconsin*, 228 U. S. 115, 133, 136, in which the

⁶¹ This Court may well note judicially that the aggregate tonnage of such commodities is enormous.

⁶² About 200. See Crawford, "Administration of the Federal Food, Drug, and Cosmetic Act," *Food Drug Cosmetic Law Quarterly* (Commerce Clearing House Publication) 9, 10 (March 1946).

⁶³ During fiscal year 1944, "decomposition, insect or rodent infestation, or other filth in foods was charged in 1,723 of the 2,411 food seizure actions." Annual Report of the Federal Security Agency, Section One, Food and Drug Administration, 1945, page 60.

scope of the authority contained in the 1906 statute was under consideration, the Court pointed out:

In this connection it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale.

* * *

The opportunity for inspection enroute may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, "unsold." * * * Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. *Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.* [Italics added.]

It is apparent, therefore, that the examination of commodities to determine if they are adulterated must in most instances be made at destination. Further, science has not reached the point where it can state infallibly that a particular product became debased before or during an interstate shipment rather than while in its original package at point of destination. For example, it is a well-known fact that perishable and frozen food commodities frequently deteriorate while in transit by means of transportation delays and breakdowns, faulty machinery, etc. Certainly, an inspector cannot accompany every train, truck, boat or plane transporting foods or drugs interstate to ascertain whether such situations occur. Yet the Government cannot establish in most instances just when the deterioration actually took place. Consequently, a holding that the Government must prove that the deterioration occurred before or during actual transportation, rather than at destination point in the original packages, will permit not only tremendous quantities of commodities that became adulterated after interstate shipment to reach the consuming public, but in addition large quantities of foods and drugs that actually became adulterated while in transit. And there are numerous other instances where the actual moment when adulteration occurred cannot be delineated with certainty.

Considering the remedial purpose of the Act to protect the

consuming public,⁶⁴ it is inconceivable that Congress could have intended to permit a situation to arise where filthy food products might reach the tables of the country because of the impossibility in many instances of being able to establish to the satisfaction of a court and jury that the contaminated commodity became adulterated preceding or during interstate transportation instead of at destination point. Particularly would this seem to be true since it is at terminal points that, as already indicated, a serious problem of sanitation has always existed. Certainly, as far as the consumer is concerned, it can matter little that the rodent filth in the food purchased for his table got there before rather than after its movement from one State to another. In addition, to attempt to determine whether adulteration took place at or before the terminal point, when speed is of the essence in apprehending the contaminated article lest it escape after the owner is put on notice of the pendency of enforcement action by the very act of inspection, would render the statute futile, to a considerable extent, as an instrument for the protection of the public.

In the light of the history, purposes and administrative practicalities underlying the Federal Food, Drug, and Cosmetic Act of 1938, we submit that Congress properly exercised its power over interstate commerce to assure the continuing wholesomeness of products transported interstate while they remain in the original package in the hands of the interstate consignee. We submit that, for the purposes of the Act, the storage of merchandise in original packages at terminal points after interstate transportation is so intimately associated with the interstate commerce in such merchandise as to form an integral part thereof. Once it is admitted, as we think it must be, that Congress had the Constitutional power to declare food contraband which becomes adulterated while in its original package in the possession of the consignee, the conclusion seems inevitable that Congress chose in the Federal Food, Drug, and Cosmetic Act of 1938 to exercise its power to such an end.

⁶⁴ The design of the statute was pointed out by Senator Copeland, its sponsor, at the Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 1944, 73rd Cong., 2d Sess., one of the earlier bills which led to the passage of the Act, as follows (pp. 277-278): "I am glad that the witnesses have borne in mind that the purpose of this bill is not primarily to control industry. The purpose of the bill is to protect the public, to protect the mothers and the children, to protect the citizens; and the fact that regulation is needed is not because the reputable concerns are unwilling to conform to high standards; it is because there are those in the country who are exploiting the public and desirous of imposing their products upon the public for gain. So that is why we have a bill before us at all; it is that the public may be better protected against the unscrupulous than it is at present." See also, *United States v. Two Bags * * * Poppy Seeds*, 147 F. (2d) 123, 127 (C. C. A. 6); *Libby, McNeill & Libby v. United States*, 148 F. (2d) 71, 74 (C. C. A. 2).

Conclusion

For the foregoing reasons, we submit that, in enacting the Federal Food, Drug, and Cosmetic Act of 1938, Congress exerted its power over interstate commerce in the interest of the American public to assure the continued wholesomeness of articles that had been transported interstate while they remained identifiable in the original packages. Consequently, the spaghetti and macaroni under seizure in this case became adulterated "while in interstate commerce" within the meaning of that Act. It is respectfully submitted, therefore, that the judgment of the District Court should be reversed.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For The Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

PHELPS DODGE MERCANTILE COM-
PANY, A Corporation,

Appellee.

No. 11249

BRIEF FOR APPELLEE

* * * * *

[Ed. That portion of the brief which deals with the constitutional power of Congress to direct the condemnation of food after interstate shipment is omitted.]

SUBDIVISION III

* * * * *

The first matter to which we direct the Court's attention is the poor logic * * * in appellant's treatment of United States v. Five Boxes of Asafoetida. Appellant [in its brief]

argues in connection with that case that if the proposition therein determined is true, the converse of that question must necessarily be true. This is equivalent to saying that if it is true that all goats have beards, the converse is true that everything bearded must be a goat. It is elementary logic that only the negative converse of a statement is necessarily true.

Appellee agrees that the "classic dissents" of Justice Holmes have now, in a large part, become the law of the nation, and further agrees that the dissent quoted [in] * * * appellant's brief states succinctly the purpose of the Act. Appellee contends in connection with Holmes' statement that "the transportation encourages the evil" that as a logical matter the contamination of food by rats, after delivery to consignee at a terminal warehouse, cannot be said to be a proximate result or even a probable result of interstate commerce in the particular food. The Court may take judicial knowledge of the fact that the appetite of rats generally is catholic in nature, and not circumscribed by any consideration by a rat, intelligent or otherwise, whether the food to which he addresses his attentions had at one time been a subject of interstate commerce or not. The problem involved is similar to that of the legal problem of "proximate cause," considered by Courts in connection with liability arising from a tortious act. As an illustration—it has been ably argued that if a defendant violates a speed law some substantial time before an accident, and by such violation arrives at the place of accident in time to meet another car head-on, the violation of the speed law was a proximate cause of the accident, although at the time of the accident the defendant was not negligent then and there in any respect. The Courts, however, have failed to appreciate the logic of such position, and as a general rule only look to immediate causes.

Therefore, while it may be argued, as it is argued by the Government in this case, that the transportation in interstate commerce so firmly attaches Federal control to the food packaged in an original unbroken package, that an adulteration, wherever occurring, subjects such food to the operation of the Act, under Justice Holmes' statement that "the transportation encourages the evil"—by bringing the food to a place, or into an environment where contamination may occur—still, we believe that this Court should look only to immediate causes and treat the infestation by rats in the warehouse of the consignee in Douglas, Arizona, as an independent, immediate, intrastate cause of contamination, unconnected by any legal logic with the preceding interstate movement.

B. In connection with the administrative interpretation of the Acts of 1906 and 1938 it may be said of appellee and its

attorneys that fools rush in where more cooperative merchants have long since feared to tread.

In connection with the report of the Congressional hearing concerning development of poisonous substances in anaesthetic ether, we refer the Court to the provisions of 21 U. S. C. 352 (h), (5 F. C. A., Title 21, § 352(h)) * * *

Appellee concedes that in the case of certain foods or drugs, which may deteriorate through inherent weakness while in the original package, the Federal agency can enforce seizure provisions under appropriate legislation. The seeds of decay in such materials exist from the beginning, just as it is said that at the moment of birth man begins to die. But it is a far cry from regulation of foods or drugs which are inherently dangerous before beginning interstate movement—to regulation of foods which are only subject to contamination, at least in the sense contended for in the present action, through the intervention of outside agencies. It may well be that the Food and Drug Act could provide that edible foods shipped in interstate commerce should be packaged in rat-proof wrappings, and this, we believe, would be a reasonable exercise of the power of Congress over interstate commerce, but we do not believe it follows that the Federal power extends to an independent, new adulteration which occurs when the goods have come to rest within a State after termination of interstate movement, although such goods remain in the original package.

* * *

It is said * * * that great weight should be given to administrative construction of an Act. It is equally true that where a statutory body has assumed a power plainly not granted, no amount of interpretation will be considered. See the statement by Justice Roberts in 77 L. ed. on page 1423, (Texas and Pacific Railway Co. v. United States, 289 U. S. 627, 77 L. ed. 1410, 53 S. Ct. 768).

* * *

Appellee concedes that the 1938 Act was intended to broaden the coverage of the Food and Drugs Act of 1906, but appellee contends that it must be kept clearly in mind that there are two distinct phases of the Act, and that in the present case we are only concerned with the first phase of the Act—that is, the adulteration of the food—which appellee contends must take place in some degree before the food arrives at its final resting place in the warehouse of the consignee.

It is to the second phase of the Act that appellant makes continued reference in * * * its brief. Under the Act of 1906 it was doubtful whether the administration could pursue impure food, which had been adulterated while in interstate commerce,

into the hands of a wholesaler or retailer who had taken the food out of its original package. The 1938 Act specifically gives the administration the power to pursue such food into whatever form it may take. This liberalization of the Act did not, in our opinion, change the fundamental question concerning the place of adulteration, i. e. the incident which must occur in "interstate commerce" so that the Federal power may attach.

Implementing the broader powers given by the Act of 1938, 21 U. S. C. A. 334(c), (5 F. C. A., Title 21, § 334(c)), gives the administration ample power to sample impure foods in whatever form they may be, whether in the original package in the channels of interstate commerce, or out of the original package in the warehouse of the consignee, but this power is an auxiliary power granted to implement the original power to control adulteration which must occur in some degree while the interstate process is still in operation.

D. Under the heading of "practical considerations" the appellant reiterates that in many cases it may be impossible to produce proof concerning the place or time of adulteration; further that the examination of commodities must in most instances be made at the destination; and further that the Federal Government should have the power to control sanitation at terminal points, for the implied reason that the States have been unable to do so. These arguments appellee contends, are wholly beside the point.

In the matter of "practical considerations," however, appellee points out that in a State such as Arizona the great bulk of packaged and canned foods is imported. If it were true that the Federal power attached to such canned or packaged foods by the mere fact that they had been imported across the State line, the entire field of handling and storage of packaged and canned foods in Arizona would be placed within the Federal domain.

The "original package" has been construed to mean *not* the large shipping carton but rather the individual can or individual bottle in which the food is contained. The hundreds of cans upon the shelves of the neighborhood grocer in the smallest Arizona community, the hundreds of bottles in the smallest drug store in the Arizona desert would all be subject to the exclusive control of the Federal Government in all phases of storage handling and sanitation if appellant is correct. It is true that in the absence of specific Federal legislation the States would have concurrent power to legislate, but it is also true that in the presence of specific Federal legislation the concurrent power of the State withers and dies. Therefore, the State of Arizona and the various municipalities in that State, in all probability, would be wholly without power to regulate storage facilities within its boundaries.

It is undoubtedly the feeling of the Food and Drug Administration, in view of the inadequacies of State laws, that this result is an end greatly to be desired. The stubborn fact remains, however, that under our present system of Government, this end cannot be reached without doing violence to the provisions of the United States Constitution. * * *

Conclusion

The marking out of the boundaries of Federal control by the Courts is, as noted by appellant, an empiric process. The appellee submits, upon the basis of the decisions of the United States Supreme Court and the various Federal Courts, hereinbefore referred to, that the power of the Federal Government over interstate commerce ceases at the point where goods are delivered to the warehouse of the consignee, except insofar as the Government has the right of sampling, search or seizure as auxiliary to its main power.

In the present case it is the main power of the Government which is questioned, and not the auxiliary power. It is conceded by appellee that the Government has liberal powers to sample and search to the end that violation of regulations covering interstate commerce may be discovered. It is not conceded, and it is most strenuously urged, that the offense of adulteration in some degree must take place during the course of interstate commerce, and that an adulteration of food which takes place in the warehouse of the consignee after the consigned food has come to rest, in the original package or not, is not in—"Commerce—among the several States"—(Article 7, Section 8, Clause 3, U. S. Constitution), and is not within the control of the Federal Government. We respectfully submit that the judgment of the District Court is correct and shall be affirmed.

Respectfully submitted,

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UNITED STATES v. PHELPS DODGE MERCANTILE CO.⁶⁵

Circuit Court of Appeals of the United States, Ninth Circuit, 1946.
157 F. 2d 453

MATHEWS, Circuit Judge. On an amended libel of information filed on September 28, 1945, appellant, the United States, proceeded against 175 cartons of food (150 cartons of spaghetti and 25 cartons of macaroni) in possession of appellee, Phelps

⁶⁵ The selected footnotes have been renumbered.

Dodge Mercantile Company, in the District of Arizona. The amended libel, hereafter called the libel, prayed that the food be seized and condemned. The food was seized. Appellee excepted to the sufficiency of the libel. The exception was sustained, and a decree was entered dismissing the libel and directing that the food be released to appellee. From that decree this appeal is prosecuted. The question is whether the libel stated facts sufficient to warrant condemnation of the food.

Condemnation was sought under § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a), (5 F. C. A., Title 21, § 334(a)), which provides: "Any article of food * * * that is adulterated⁶⁶ * * * when introduced into or while in interstate commerce⁶⁷ * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

The libel stated that the food was shipped in interstate commerce from Denver, Colorado, to Douglas, Arizona, in 1943—75 cartons on February 13, 1943, and 100 cartons on June 18, 1943. The libel further stated:

"That said food * * * is [on September 28, 1945] adulterated within the meaning of 21 U. S. C. A., (5 F. C. A., Title 21) as follows:

"342(a) (3) in that it consists wholly or in part of a filthy substance⁶⁸ by reason of the presence therein of insect fragments, rodent hairs, and rodent excreta;

"342(a) (4) in that it has been held under insanitary conditions whereby it has been contaminated with filth⁶⁹ while held in the original packages by [appellee] at [appellee's] warehouse in Douglas, Arizona."

(1) Thus the libel stated, in substance and effect, that on September 28, 1945—more than two years after it was shipped in interstate commerce—the food was adulterated. The libel did

⁶⁶ Section 402 of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 342 (5 F. C. A., Title 21, § 342), provides: "A food shall be deemed to be adulterated—

"(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance * * * or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth * * *

⁶⁷ Section 201(b) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 321(b) (5 F. C. A., Title 21, § 321(b)), provides: "The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body."

⁶⁸ See § 402 (a) (3) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 342 (a) (3); 5 F. C. A., Title 21, § 342 (a) (3).

⁶⁹ See § 402 (a) (4) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 342 (a) (4); 5 F. C. A., Title 21, § 342 (a) (4).

not state that the food was adulterated when introduced into or while in interstate commerce.⁷⁰ Instead, the libel stated, in substance and effect, that the food was adulterated while held in original packages by appellee at its warehouse in Douglas, Arizona. Thus it appeared that the adulteration of the food occurred after it ended its interstate journey and came to rest at appellee's warehouse.

(2) Appellant contends that the fact that the food was adulterated while held in original packages was sufficient to warrant its condemnation. We do not agree. As shown above, § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a), (5 F. C. A., Title 21, § 334(a)), under which this proceeding was brought, provides for the condemnation of "Any article of food * * * that is adulterated * * * when introduced into or while in interstate commerce." It says nothing about original packages. The terms "interstate commerce" and "original packages" are not synonymous. Articles may be in interstate commerce without being in original packages. They may be in original packages without being in interstate commerce. They may be in both interstate commerce and original packages and, if in both, may cease to be in interstate commerce and yet remain in original packages. Hence the fact that the food was adulterated while held in original packages did not show that it was adulterated when introduced into or while in interstate commerce.

(3) Appellant cites, in support of its contention, § 10 of the Food and Drug Act of 1906, 21 U. S. C. A. § 14, (5 F. C. A., Title 21, § 14), which provided that "Any article of food * * * that is adulterated * * * and is being transported from one State * * * to another for sale, or, having been transported, remains * * * in original unbroken packages * * * shall be liable to be proceeded against * * * and seized for confiscation by a process of libel for condemnation." This proceeding was not brought, and could not have been brought, under § 10 of the Food and Drug Act of 1906, 21 U. S. C. A. § 14, (5 F. C. A., Title 21, § 14), for that section was repealed long before this proceeding was brought. As stated above, this proceeding was brought under § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a), (5 F. C. A., Title 21, § 334(a)). The quoted provision of § 10 of the Food and Drug Act of 1906, 21 U. S. C. A. § 14, is not in § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a), (5 F. C. A., Title 21, § 334(a)), and should not be read into it by construction.

⁷⁰ See § 304 (a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a); 5 F. C. A., Title 21, § 334 (a).

Whether Congress could have provided in § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a), (5 F. C. A., Title 21, § 334(a)), for the condemnation of any article of food that is adulterated while held in original packages after being transported in interstate commerce need not be considered, since Congress did not, in fact, so provide.

(4) Appellant says that administrative officers charged with the duty of enforcing § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 334(a), (5 F. C. A., Title 21, § 334(a)), have interpreted it as providing for the condemnation of any article of food that is adulterated while held in original packages after being transported in interstate commerce. Being clearly erroneous, that interpretation need not and should not be followed by the courts.

Appellant has cited no court decision supporting its contention, and we have found none. We conclude, as did the court below, that the libel did not state facts sufficient to warrant condemnation of the food.

Decree affirmed.⁷¹

III

D. "GENERAL INTERPRETATION" STATUTES: HOW VALUABLE A METHOD FOR REDUCING AMBIGUITIES IN LEGISLATIVE LANGUAGE?

In view of what you have learned thus far about ascertaining the meaning of ambiguous legislative language, what are your views as to the value of the following statutory materials? Would you recommend the enactment of some such "general interpretation" measures on both the federal and state levels as a means of reducing ambiguities in legislative language. Why?

* * *

Laws of Nebraska, 1947, Ch. 182

Sec. 2. Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows:

(1) When the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed.

(2) The present tense of any verb includes the future, when applicable.

(3) The phrase "shall have been" includes past and future cases.

(4) Gender when referring to masculine also includes feminine and neuter.

⁷¹ [Ed.] Certiorari denied, 330 U. S. 818 (1947).

(5) Words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.

(6) Singular words may extend and be applied to several persons or things as well as to one person or thing.

(7) Plural words may extend and be applied to one person or thing as well as to several persons or things.

(8) Title heads, chapter heads, section and subsection heads or titles, and explanatory notes and cross references, in the statutes of Nebraska, supplied in compilation, do not constitute any part of the law.

(9) Whenever, in the statute laws of this state, a reference is made to two or more sections and the section numbers given in the reference are connected by the word "to," the reference includes both the sections whose numbers are given and all intervening sections.

(10) No law repealed by subsequent act of the Legislature is revived or affected by the repeal of such repealing act.

(11) The repeal of a curative or validating law does not impair or affect any cure or validation previously perfected thereunder.

The enumeration of the rules of construction set out in this section is not intended to be exclusive, but is intended to set forth the common situations which arise in the preparation of legislative bills where a general statement by the Legislature of its purpose may aid and assist in ascertaining the legislative intent.

* * *

Nebraska Revised Statutes (1943)

§ 29-101. General terms defined. Unless otherwise provided, words used in this code in the present tense include the future as well as the present. Words used in the masculine gender comprehend as well the feminine and neuter. The singular number includes the plural and the plural the singular. The term "writing" includes printing. The term "oath" includes an affirmation.

§ 29-105. Code; how construed; general and special provisions. In the construction of this code each general provision shall be controlled by a special provision on the same subject, if there is a conflict.

§ 29-106. Code; to be construed according to plain import of language. This code and every other law upon the subject of

crime which may be enacted shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit.

§ 29-107. "Person" or other general term, where protection of property intended; meaning; how extended. Whenever any property or interest is intended to be protected by a provision of the penal law, and the general term "person" or any other general term is used to designate the party whose property is intended to be protected, the provisions of such penal laws and the protection thereby given shall extend to the property of the state, or of any county, and of all public or private corporations.

§ 29-109. Terms not defined; how construed. Except where a word, term or phrase is specially defined, all words used in this code are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed. The titles merely, to the various chapters, articles, sections or clauses of this code, which are written or printed upon the bill at the time of its approval, shall constitute no part thereof.

IV

E. PROBLEMS: ON THE FEDERAL LEVEL

Problem A:

The Government files a criminal information against the X Drug Corporation under Section 301(d) of the Food, Drug and Cosmetic Act of 1938, (5 F. C. A., Title 21, § 331(d)), charging that the Corporation introduced a new drug into interstate commerce without first filing an application, as required by section 505, (5 F. C. A., Title 21, § 355). The Corporation demurs on the ground that the Y Laboratories, a competitive drug manufacturing concern, had filed an application with respect to the identical drug; that a single effective application is sufficient because Section 505(a), (5 F. C. A., Title 21, § 355(a)), provides that: "No person shall introduce . . . any new drug, unless an application . . . is effective with respect to such drug." The Government argues, however, that since Section 505(b), (5 F. C. A., Title 21, § 355(a)), requires that the application contain, among other things, "a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing" a drug, and since such methods could

vary from manufacturer to manufacturer—as was the case with the X Corporation and the Y Laboratories—Congress intended that a separate application should be filed by each manufacturer.

(1) Counsel for the X Drug Corporation requests you (one of his assistants) to search legislative history carefully, to employ every reasonable extrinsic aid to interpretation in order to support the position of the Corporation, to knit these materials into a plausible argument and then submit it in the form of a written legal memorandum for possible inclusion in a brief to the court. (Assume that there are no case precedents, i. e. that the controversy is one of first impression.)

(2) Follow the directions of (1) *supra*, except that you are the government's attorney and are called upon to draw up a plausible legal argument in support of the government's position.

Some Helpful Working Materials

In each instance you are given the contents of a file of materials which one of your predecessors was preparing up until the time he was transferred to a different case. These include a copy of the government's publication "The Enactment of a Law," (see p. 298 *infra*); excerpts from a book of Notz, containing hints on finding Congressional legislative history (see p. 195 *infra*); and the following worksheet. You are told that the legislative history contained in the worksheet is by no means complete, and that it may or may not be helpful.

The "Worksheet"

(a) S. 5 originally had no "new drug" section, but, following the "Elixir Sulfanilamide Disaster," Senator Copeland introduced S. 3073 in the 2d session of the 75th Congress. This bill forbade the introduction into interstate commerce of "any drug . . . not generally recognized as safe for use . . . unless the packer of such drug holds a notice of finding by the Secretary that such drug is not unsafe for use" [82 Cong. Rec. 585 (1937)].

(b) S. 3073 came before the Senate and was passed by it without debate on May 5, 1938. No report accompanied the bill. The bill is set forth in 83 Cong. Rec. 6263, 6264 (1938).

(c) The following conversation concerning S. 3073 took place:

"Mr. King. I should like to have an explanation of this bill.

* * *

Mr. Copeland. The bill was introduced at the time when a large number of deaths occurred throughout the country from the sale of the elixir of which I have spoken. It developed that there was no means of protection, through

the Public Health Service or the Bureau of Food and Drugs, to make certain that new preparations were given proper examination in order to insure that they were safe for human consumption. That is the purpose of the bill. . . . [83 Cong. Rec. 6264 (1938)].

(d) In the 3d Session of the 75th Congress, Representative Chapman introduced in the House a bill similar to S. 3073. This bill (H. R. 9341) was referred to the Committee on Interstate and Foreign Commerce where its provisions were incorporated into S. 5.

(e) Committee Reports:

(1) The "new drug" provision was not a part of S. 5 when Sen. Rep. No. 91, 75th Cong. 1st Sess. (1937) and Sen. Rep. No. 152, 75th Cong., 1st Sess. (1937) were made.

(2) The "new drug" provision was incorporated into S. 5 by the House Committee. H. Rep. No. 2139, 75th Cong., 3d Sess. 9 (1938) explains Section 505(a) as follows:

"Section 505(a) requires new drugs to be adequately tested before they are commercialized. In order to insure that the tests made have been complete, the introduction of a new drug is prohibited unless the manufacturer has submitted full information showing that the drug has been adequately tested, . . . This provision will not put the Federal Government into the business of developing new drugs, nor will it require the Government to duplicate tests made by responsible manufacturers. The provision merely sets up a method for the authoritative review of the manufacturer's tests and will not unreasonably delay review of the manufacturer's tests. . . ."

Many recommendations have been received for the substitution of additional penal provisions for this section. The purpose of your committee in adopting the system as it stands is to prevent incompetent and irresponsible manufacturers from causing wholesale deaths . . . "

(3) The Conference Report does not contradict the House Report. See H. R. Rep. No. 2716, 75th Cong., 3d Sess. (1938).

(f) When S. 5 was being debated in the House on May 31, 1938, Mr. Lea made the following observation with respect to Section 505:

"Mr. Lea. * * * I should like to call attention briefly to some features of the bill that increase the scope of the present food and drug law. * * * New drugs are required to be adequately tested for safety before they are placed on the market. [83 Cong. Rec. 7774 (1938)]

[Ed. Mr. Lea directed the debate in favor of the bill.]

(g) Representative Coffee on the same day made the following remarks:

"Mr. Coffee. * * * I am not going to analyze that bill [S. 5 as reported out by the House Committee] in detail, but just touch upon a few essentials.

When the famous elixir sulfanilamide claimed its 73 victims last fall, the Secretary of Agriculture made certain recommendations to Congress for legislation to prevent the recurrence of such utterly needless and inexcusable tragedies.

* * *

Yet what do we find in the House bill? A back-handed type of control that puts the real responsibility on the Government. The manufacturer who proposes to put out a new drug product may simply turn over to the Department of Agriculture a sample of his product, together with the labeling he intends to use and what he considers proof of its harmless character when used as he directs. If at the end of 60 days the Secretary of Agriculture has not denied his application, he can go ahead with it." [83 Cong. Rec. 7783, 7784 (1938).]

(h) The "new drug" section as incorporated into S. 5 by the House Committee was subsequently passed by the House and Senate without amendment.

(i) Administrative Interpretation:

(1) Regulations are found in Chapter I of Title 21 of the Code of Federal Regulations (1938 supp.) section 2.110, as amended April 10, 1941, and as further amended Oct. 9, 1944.

(2) Regulations as well as instructions for filling out applications are specific, and suggest that the Administrator interprets Section 505 as requiring multiple applications.

REBECCA L. L. NOTZ, LEGAL BIBLIOGRAPHY AND LEGAL RESEARCH⁷²

pp. 93-96 (1947, 1948 Supplement)⁷³

* * *

(a) To locate the text of a given law in the Statutes at Large⁷⁴ when only the date is known, consult the chronological list of acts at the beginning of the volume of the Statutes at Large covering the date.

⁷² Reprinted with the permission of the National Law Book Company and Rebecca L. L. Notz.

⁷³ The footnotes have been renumbered.

⁷⁴ The Public Statutes at Large of the United States of America, from the organization of the government in 1789 to March 3, 1845. Boston, Charles C. Little and James Brown, 1846-1848. 8 vol.; Statutes at Large . . . of the United States of America . . . Boston, Charles C. Little and James Brown, 1851-1873. vol. 9-17. (Dec. 1845—Mar. 1873; publisher changes to Little, Brown and Co. with v. 10); Statutes at Large of the United States. Washington, G. P. O., 1875-1946-. vol. 18-59- (Dec. 1873-1945-; title changes to "United States Statutes at Large" with vol. 50).

(b) To locate the text of a law enacted during a current session of Congress, when the date is known, consult (1) the United States Code Congressional Service⁷⁵ covering the date, and subsequent "slip laws," for a public law, and (2) "slip laws" for any private act.

(c) To locate a law for which only the popular name is known, (for example the Walsh-Healey Act), in the Statutes at Large, the United States Code or the United States Code Congressional Service, consult tables in the United States Code⁷⁶ (Index volume of 1940 edition, pages 4731-4780) and the latest supplement, or the Index volume of the United States Code Annotated,⁷⁷ at the very beginning of the volume, and its pocket supplement, or Shepard's Federal Acts by Popular Names⁷⁸ (covering laws through 1945) and for laws of a current session of Congress, similar tables in the latest number of the current United States Code Congressional Service⁷⁹ and lists in the cumulative supplement to Shepard's U. S. Citations. In the 1946 edition of the United States Code⁸⁰ consult tables at the end of volume 4, on pages 6207 to 6278.

(d) To procure the legislative history (statutory) of a certain provision of law included in the U. S. Code,⁸¹ consult the notes following the text of the law in the Code. The sources of the Code provision, in the Statutes at Large, are listed.

(e) To find the location in the U. S. Code, of a specific section of law in the Revised Statutes or the Statutes At Large consult the tables in the U. S. Code⁸² (1946 edition, vol. 4, pages 5919-6084) and the latest supplement thereto.

To find the U. S. Code classification for a public law which has not yet been published in the Statutes at Large or U. S. Code, consult table 2 in the U. S. Code Congressional Service⁸³ volume

⁷⁵ United States Code Congressional Service. St. Paul, West Publishing Co., 1939-1945- and 1946, No. 1 to date. [vol. 1-7 and v. 8, no. 1-].

⁷⁶ (a) United States Code. 1940 edition. Containing the general and permanent laws of the United States, in force on January 3, 1941. Prepared . . . by the Committee on Revision of the Laws of the House of Representatives . . . Washington, G.P.O., 1941. 4 vol.

(b) United States Code. Supplement V . . . Jan. 3, 1941 to Jan. 13, 1946. Washington, G.P.O., 1946. 1694 p.

⁷⁷ United States Code Annotated . . . St. Paul, West Publishing Co., 1928-1945- [67 vol.] and pocket supplements.

⁷⁸ Federal Acts by Popular Names or Short Titles. New York, The Frank Shepard Co. [1937]. Same Supplement, Jan. 1, 1937-Jan. 1, 1946. 45 p. (Kept up to date in cumulative supplements and advance sheets of Shepard's U. S. Citations.)

⁷⁹ See footnote 75, *supra*.

⁸⁰ United States Code, 1946 edition. Containing the general and permanent laws of the United States in force on January 2, 1947. Washington, G.P.O., 1947-1948. 5 vol. (Same Supp. I, Jan. 3, 1947-Jan. 5, 1948). G.P.O., 1948. 652 p.

⁸¹ See footnote 76, *supra*.

⁸² See footnote 80, *supra*.

⁸³ See footnote 75, *supra*.

which covers the law. If in an unbound volume of the Service, consult the cumulative table in the last number.

(f) To locate a specific section of the Bankruptcy Act, the Criminal Code or the Judicial Code, in the U. S. Code, consult Tables III and VI in the U. S. Code, 1946 edition⁸⁴ (vol. 4, pages 6092 and 6105) for the Bankruptcy Act and Interstate Commerce Act, respectively. Since the sections in the new 1948 Criminal Code, the Internal Revenue Code and the new 1948 Judicial Code and the sections in Titles 18, 26 and 28, respectively, of the U. S. Code correspond, it is no longer necessary to consult tables for this purpose. The conversion tables for the Internal Revenue Code provisions in the 1934 and 1925 editions of the U. S. Code, showing their location in Title 26 of the 1946 edition appear in vol. 4, pages 6095 to 6103 of the 1946 edition.

(g) To procure the legislative history (in Congress) of a specific provision of law before enactment (a bill) and to ascertain the House and Senate Report numbers:

(1) Locate the law in the Statutes at Large (see (a), (c) and (d), above) and at the beginning of the act note (1) the bill number (H. R. 432) or (S. 432), (2) the date of approval, in the margin and (3) the number and session of the Congress, at the top of the page or on the back of the volume;

(2) Consult the index volume of the Congressional Record covering the particular Congress and session when the act was approved. Under the bill number, in the History of Bills and Resolutions, the citations to pages in the Record covering its introduction, reference to committee, reports out of committees (with House and Senate Report numbers), debates, passage by each House and approval will be found. If the beginning of the history is not given, consult indexes for earlier sessions of the same Congress. Since bill numbers do not appear in the Statutes at Large prior to volume 33, early laws must be located in the Congressional Record index volume for the Congress and session of passage by subject matter. The Federal Law Section of the Legislative Reference Service in the Library of Congress has procured the bill numbers for earlier laws. The histories of bills in the indexes began with the volume of Congressional Globe covering the 40th Congress, 1st session, which began in March 1867 (including laws since 15 Stat. 1), but bill numbers have appeared in the subject indexes since the 35th Congress, 1st session, which began in December 1857 (including laws since 11 Stat. 257).

(h) To ascertain whether there are any printed hearings on a particular bill, consult the indexes of committee hearings . . . where they are listed under the bill numbers, the Document

⁸⁴ See footnote 80, *supra*.

Catalogue⁸⁵ . . . where they are listed under the name of the committee, and for hearings earlier than 1910, the Document Check-list.⁸⁶ Since the Document Catalogue⁸⁷ has been discontinued, it is necessary to consult the New Monthly Catalogue Supplements,⁸⁸ covering the years 1941 to 1946, and subsequent volumes and numbers of the Monthly Catalogue⁸⁹ to locate printed hearings subsequent to 1940. They are listed under the name of the committee.

(i) To locate any public general Federal law in force at the present time on any particular subject consult (1) the United States Code,⁹⁰ (2) the latest supplement to the U. S. Code, (3) the United States Code Congressional Service⁹¹ and (4) any subsequent "Public Laws" (or "slip laws").

Since the United States Code is well-indexed the index method of approach may be used. Any repeal or amendment of a provision in the U. S. Code would be found under a corresponding title and section in the supplement. Subsequent repeals or amendments may be located in the table of repeals or amendments to the U. S. Code in the last current issue of the United States Code Congressional Service.⁹²

It is very important to note any cross-reference found under sections in the U. S. Code, for sometimes the reference is to an implied amendment or repeal.

If the U. S. C. A.⁹³ or F. C. A.⁹⁴ is used, it is better first to go directly to the index of the volume or title covering the subject involved, instead of to the general index, which may be consulted later if necessary. All F. C. A. volumes and many of the U. S. C. A. volumes have separate indexes.

After locating a law in the U. S. Code, its supplement or the U. S. Code Congressional Service, check with the official text in

⁸⁵ U. S. Superintendent of Documents. Catalogue of the public documents of Congress and of all departments of the government of the United States . . . March 4, 1894-Dec. 31, 1940-Washington, G.P.O., 1896-1945-Vol. 1-25-

⁸⁶ U. S. Superintendent of Documents. Checklist of United States documents, 1789-1909, 3rd ed. Washington, G.P.O., 1911. 1707 p.

⁸⁷ U. S. Superintendent of Documents. Catalogue of the public documents . . . (Discontinued with vol. 25, 76th Cong., 1940)

⁸⁸ U. S. Superintendent of Documents. Supplement to U. S. Government Publications, Monthly catalog . . . , 1941-1942. Washington, G.P.O. 1947. Same 1943-1944. Washington, G.P.O., 1947. Same 1945-1946. Washington, G.P.O., 1948.

⁸⁹ See footnote 88, *supra*.

⁹⁰ See footnote 76, *supra*.

⁹¹ See footnote 75, *supra*.

⁹² *Ibid*.

⁹³ United States Code Annotated . . . St. Paul, West Publishing Co., 1928-1945- [67 vol.] and pocket supplements.

⁹⁴ Federal Code Annotated. All Federal laws of a general and permanent nature. . . . Indianapolis, The Bobbs-Merrill Co., Inc. [1936-1949-] 13 vol. (in 17), Ten-year Cumulative Supplement [1947] Books 1 to 5, and pocket supplements.

the Statutes at Large or public laws. If there is any discrepancy the Statutes at Large and public laws prevail, for the U. S. Code is only *prima facie* evidence of the law. By way of exception, any title of the U. S. Code which has been enacted as positive law (such as Titles 1, 3, 4, 6, 9, 17, 18 and 28 enacted in 1947 and 1948) are the law and no longer only *prima facie* evidence of the law.

To locate decisions on the law, use one of the annotated editions of the U. S. Code and its supplement and check Shepard's United States Citations.⁹⁵ . . .

(j) To locate public general Federal law in force on a given date, on a particular subject, check the latest code or collection of laws in force at that time and subsequent volumes of the Statutes at Large⁹⁶ up until the given date. For this purpose, the Index of Federal Statutes⁹⁷ is very useful, for it indexes all permanent, public, general laws from the Revised Statutes of 1873 to March 4, 1931, gives the citations in the 1926 edition of the U. S. Code and contains tables of repeals and amendments of laws indexed. After locating law in one of the collections of laws, proceed as outlined under subdivision (i) above.

(k) To find the United States Code location of a provision in one of the earlier unofficial annotated editions of the laws (such as the U. S. Compiled Statutes or the Federal Statutes Annotated), consult the volume of tables in the U. S. C. A. or F. C. A.

(l) To locate any decision on a Federal law which is not in the United States Code (for instance, a temporary, private or local law), consult Shepard's United States Citations. . . . The F. C. A. contains annotations to "uncodified laws" in its volume of tables. Any law which has been passed upon by the U. S. Supreme Court is listed in the Co-op. Digest of the U. S. Supreme Court reports,⁹⁸ in the tables of statutes in volume 1.

* * *

Problem B:

The Government files a criminal information against the White Drug Corporation under section 301(a) of the Food,

⁹⁵ Shepard's United States Citations, Statutes—Department Reports. 5th edition. Statute and Department Reports edition, 1943. N. Y., The Frank Shepard Co., 1943. 913 p.; Shepard's United States Citations. Cases. 5th edition. (Case edition, 1943). N. Y., The Frank Shepard Co., 1943, 3547 p.; Same. Cumulative Supplement (unbound), and Advance Sheets.

⁹⁶ See footnote 74, *supra*.

⁹⁷ Index to the Federal statutes, 1874-1931, general and permanent law contained in the Revised Statutes of 1874 and volumes 18-46 of the Statutes at Large. Revision of the Scott and Beaman Index Analysis of the Federal Statutes, by Walter H. McClenon and Wilfred C. Gilbert . . . Washington, G.P.O., 1933. 1432 p.

⁹⁸ Digest of the United States Supreme Court Reports. Rochester, Lawyers Cooperative Publishing Co., 1928-1945. 11 vol. and pocket supplements.

Drug and Cosmetic Act of 1938, (5 F. C. A., Title 21, § 331(a)), charging that the Corporation introduced adulterated vitamin products into interstate commerce. The Corporation maintains that (1) it acted merely as a distributor of the vitamins and relied upon a guaranty of compliance with the Federal Food, Drug and Cosmetic Act given by the manufacturer to the Crown Drug Company; (2) the vitamins in question were acquired by the Corporation with the purchase of the entire wholesale stock and business of the Crown Company; and (3) the guaranty given by the manufacturer to the Crown Drug Company was general and continuing in form and attached to the product alleged to be adulterated. The Government admits that the Corporation acted only as a distributor and did not alter the product in any manner, but argues that since the Corporation did not purchase the vitamins directly from the manufacturer, the guaranty does not inure to the Corporation's benefit. The guaranty in question was as follows:

The article comprising each shipment or other delivery hereafter made by Vitamino Corporation to, or on the order of the Crown Drug Corporation, Lincoln, Nebraska, is hereby guaranteed, as of the date of such shipment or delivery, to be, on such date, not adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, and not an article which may not, under the provisions of section 404 or 505 of the Act (5 F. C. A., Title 21, §§ 344, 355), be introduced into interstate commerce.

Vitamino Corporation

Detroit, Michigan

by (signed) B. A. Capsule

B. A. CAPSULE, Pres.

(1) Counsel for the White Drug Corporation requests you to prepare a legal memorandum in support of the Corporation's position using, among others, available materials of legislative history.

(2) Follow the directions of (1) *supra*, except that you are the government's attorney and are called upon to write a legal memorandum in support of the government's position.

(3) Assume in both (1) and (2) above, that there are no case precedents, i. e., that the controversy is one of first impression.

Problem C:

The Green Pharmacy Company manufactures a small wafer-shaped drug product which is packaged in rolls similar to those used to wrap candy mints and fruit drops. Printed on the outside wrapper of each roll are directions for use as well as the information required by section 502(b) of the Act (5 F. C. A.,

Title 21, § 352(b)). Three of these rolls are contained in a cardboard container which, in addition to the printed information found on each roll, displays a warning statement, "To Relieve Indigestion—This Preparation Should Not Be Given to Children Except on Competent Advice." The Company ships the drug to its retailers who, in turn, sell the product either in three-roll packages or in separate individual rolls. Subsequent to an interstate shipment of the drug, the Government files a criminal information against the Green Pharmacy Company charging violation of section 502(f) (2) of the Act (5 F. C. A., Title 21, § 352(f) (2)) in that the *individual* rolls do not bear the warning statement. The Company files a motion to dismiss on the ground that it has complied with the necessary labeling requirements, since section 201(m) defines the term "labeling" to include printed matter upon the container, and the warning statement in question appears on the product's container. Prepare a written memorandum in support of (1) the company's position and (2) the government's position—using available materials and "weapons" for fathoming legislative "intent." Assume that this is a case of first impression in the court, i. e., that there are no case precedents to help you.

Problem D:

The Government files a criminal information against the Bu-Tee Corporation, a wholesale distributor, under section 301(a) of the Food, Drug and Cosmetic Act of 1938 (5 F. C. A., Title 21, § 331(a)), charging that Bu-Tee introduced an adulterated cosmetic product into interstate commerce. Bu-Tee claims immunity under Sec. 303(c) of the Act (5 F. C. A., Title 21, § 333(c)) by virtue of a guaranty of compliance with the Federal Food, Drug, and Cosmetic Act which was secured from the manufacturer of the product one week after the criminal information was filed. The Government admits that Bu-Tee was merely a distributor and did not alter or reprocess the product in any manner, but argues that Congress did not intend that a distributor may avoid prosecution by obtaining a guaranty from the manufacturer after his prosecution has begun.

(1) Counsel for the Bu-Tee Corporation requests you to prepare a legal memorandum in support of the Corporation's position for possible inclusion in a brief to the court, using, among others, available materials of legislative history. Assume that there are no case precedents on the problem.

(2) Follow the directions of (1) *supra*, except that you are the Government's attorney and are called upon to write a legal memorandum in support of the Government's position.

V

PROBLEMS: ON THE STATE LEVEL

Introductory Note

In tackling a problem involving the interpretation of ambiguous legislative language on the state level, the lawyer's task is made more difficult by the absence in most jurisdictions of an orderly method for obtaining the legislative history of an enactment. On the federal level, the availability of printed committee reports, hearings, debates, etc., makes the task of exploiting the various extrinsic aids comparatively simple. (See, for example, Notz's directions for finding legislative history on the national level, *supra*, p. 195). In most state jurisdictions, however, the debates are not printed, the issuance of committee reports and hearings are sporadic—and when made available, too often contain abrupt conclusions rather than the reasoning processes behind them. This does not mean, however, that there are not any source materials of state legislative history which might be tapped for use in problems of interpretation; it means, merely, that in most instances they are more difficult to locate and dislodge. The availability of these source materials, of course, vary from state to state; and no attempt will be made here to catalogue them. Instead, a single state—Nebraska—has been selected to suggest what might be done elsewhere to apprise the would-be lawyer of what "equipment" is available for possible use in his particular jurisdiction. What follows, therefore, are: (1) hints on finding and utilizing the history of legislative enactments in the state; and (2) problems to develop the skills for unearthing these materials and for utilizing them in advocacy in the particular state.

ROBERT A. BARLOW, JR., HINTS ON FINDING AND
UTILIZING THE HISTORY OF STATE LEGISLATIVE
ENACTMENTS IN NEBRASKA

Courts, when faced with the problem of ascertaining the meaning of ambiguous legislative language, often resort to the use of extrinsic aids, because the language on the face of a statute may not furnish any adequate clues to its meaning. Many of these extrinsic aids are found in the events which comprise the history of a statute from the date of its conception as a proposal to its birth as a legislative enactment. In endeavoring to marshal the materials for establishing the history of a legislative enactment in briefs and arguments, however, lawyers are often at a loss to know just what the sources of the legislative history are, and where they may be found. It is for this reason

that these suggested "hints" are offered. A word of caution, however: the presentation of these sources is not to be taken as an evaluation of their relative weights in terms of their persuasive power before the courts. This will depend upon a host of variables, sufficiently complex as to defy reduction to certainty, e. g. the skill of the advocate, and the mood of the court with respect to the particular problem at hand. Suffice it to say, therefore, that these are merely "hints" as to what may be used by attorneys in the preparation of briefs and arguments before the courts—and not what their use will yield in any particular situation.

To trace the history of a state legislative enactment in Nebraska:

1. Locate the enacted law in the Revised Statutes of Nebraska (1943), including the supplements thereto. Immediately below the applicable section (or sections) note:

(a) the number of the section and the chapter of the session laws (Laws of Nebraska) in which it originated,

(b) the number of the section and the chapter of the session laws for each year the section in question was amended—if at all.

(c) the number of the section in any previous revision—if it was there so contained.

2. Locate the enacted law as it first appeared in the session laws; examine the original wording of the section and ascertain its meaning in relation to the other sections of the same act.

3. The title of the act appears in the session laws, and this should be examined in relation to the subject matter of the act. Inasmuch as the subject of the act must be clearly expressed in the title,⁹⁹ it might be helpful in crystallizing the meaning of the section.

4. If the wording of the original session law differs from the language of the enactment in its present form, the acts as they appear in the session laws which amended the original section should likewise be examined; the changes in wording should be traced and the implications of the changes evaluated. The substitutions, insertions, or eliminations of words or sentences may furnish a clue to the circumstances surrounding the need for amendment.

5. If the wording of the original session law was changed when it was incorporated in the Revised Statutes of 1943, the Report of the 1943 Statute Commission, which was adopted by the Legislature as the Revised Statutes of 1943, should be consulted. This report notes all omissions and changes in wording

⁹⁹ Nebr. Const., Art. III, § 14.

or arrangement, with the reasons for such omissions or changes.¹ If the change was occasioned by the 1913 revision of the statutes, however, a more difficult problem is presented, for the report of the Statute Commission of 1913, which was adopted by the Legislature as the Revised Statutes of 1913, does not include the reviser's notes.

6. When examining the pertinent acts in the session laws the legislative number of the bill in which the section originally appeared and the legislative number of subsequent bills which, when enacted, amended the section, should be noted. These numbers provide the means for tapping whatever expression of legislative purpose may have been inserted by the legislative body in the Journals with respect to a particular proposal. The Constitution of Nebraska provides that the Legislature must keep and publish a journal of its proceedings,² and by rule it is the duty of the Clerk of the Legislature to keep a brief daily journal.³ These daily journals, as prepared by the Clerk, are approved by the Legislature, and filed in the office of the Clerk of the Legislature.⁴ In addition, they are printed throughout the session, and at the conclusion of the session are compiled and published under the authority of the Legislature in a bound volume which becomes the Legislative Journal for that session.⁵ This volume is an important source of legislative history in Nebraska since in it is contained the official version of the proceedings of the Legislature.⁶ Moreover, the Nebraska court apparently still adheres to the view that in case of a conflict between the enrolled bill and the Journal over the correctness of the version of an enactment, the Journal controls.⁷ The official version as contained in the Journal is, however, not a comprehensive account of every event which transpired on the floor of the Legislature, but only a brief—and sometimes innocuous—listing of some of the high spots. One might, for example, find reference to the fact that:

¹ If the section as it appears in the revised statutes was changed from its original form, the wording of the section as revised is controlling. See *In re Estate of Berg*, 139 Neb. 99, 296 N. W. 460 (1941); and *Hocor v. State*, 141 Neb. 329, 3 N. W. 2d 558 (1942).

² Art. III, § 11.

³ Rules of Neb. Legislature (1947) Rule 3, § 7.

⁴ For the sessions prior to the first unicameral session in 1937, the daily journals are filed in the office of the Secretary of State.

⁵ Prior to the first session of the Unicameral Legislature in 1937, a separate journal was compiled and published each session for each branch of the Legislature. Hereafter the singular, "Journal," will be used even though the statement or illustration is applicable to the Journals of the unicameral as well as the bicameral sessions.

⁶ *Nebr. Rev. Stat.* (1943) § 25-1290.

⁷ See Nutting, *The Enrolled Bill and the Validity of Legislation*, 15 *Nebr. L. Bull.* 233 (1937). There appear to be no decisions involving this problem since Professor Nutting's article was published.

(a) a bill for an act relating to a certain subject was introduced by a certain Senator, and read the first time by title;⁸

(b) the bill was read the second time by title and referred to a certain committee;

(c) the committee set a hearing on the bill for a certain time;

(d) and the committee reported the bill to General File with certain specified amendments.

7. The amendments to bills which are introduced do not shed much light on the legislative purpose without studying them against the background of the bill as introduced. The latter is not printed in the Journal, however, but filed in the office of the Clerk of the Legislature.⁹ A statement of the committee with reference to the bill and the proposed amendments, or the minutes of the committee covering the hearing on the bill may also be helpful. By rule, each standing committee must, when reporting a bill, submit with it a brief statement giving the main purpose of the bill, the committee's reason for so reporting and the minority view, if any.¹⁰ It would seem that this rule would produce important records of history from which legislative intent could be distilled, but, depending upon the nature of the bill and the personnel of the committee, these range from statements that the committee "feels" that the bill should not be reported out because the present law is adequate, to a comprehensive statement such as the following which accompanied a bill introduced in the sixtieth session of the Legislature in 1947 concerning pensions for members of police departments:

It was the unanimous opinion of the committee after a full and complete hearing that L. B. 4 should be reported to General File for the further consideration of the Legislature because it serves to correct and properly adjust a breach of contract between the policemen and the city of Omaha which occurred by way of an amendment to the Omaha City Charter in a city election subsequent to the employment of those same policemen. It also should be emphasized that the provisions of L. B. 4 in no way affect

⁸ Titles of bills as introduced are entered in the daily journal by the Clerk. Rules of Nebr. Legislature (1947) Rule 8, § 2.

⁹ Prior to the first unicameral session in 1937 the office of the Secretary of State served as a repository for legislative records. Thus, for the bicameral sessions bills which were introduced are filed in that office.

¹⁰ Rules of Nebr. Legislature (1947) Rule 6, § 10. The original statement which is signed by the chairman of the committee is filed in the office of the Clerk of the Legislature. Copies of these statements are furnished to the members of the Legislature. Prior to the first unicameral session the rules merely provided that the committee submit a written report to the effect that the bill was "reported to General File" or "indefinitely postponed." Thus, any reports of the bicameral legislatures' committees which might be found in the office of the Secretary of State are probably no more revealing than the Journal entry of the committee report.

the pension status of policemen employed by the Omaha City Police Department subsequent to the effective date of the City Charter Amendment referred to July 1, 1942.

8. The standing committees are required by the rules to keep a record of their proceedings.¹¹ As in the case of the statements of the committees, their scope and the manner in which these minutes are kept vary with the nature of the bill considered and the personnel of the committee. For example, the entry concerning one bill may state that the Senator who introduced the bill explained its purpose to the committee and no one appeared in opposition to it, while the record covering the hearing on another bill in the same committee may list the persons who appeared for and against the bill and give a summary or verbatim transcription of what each person said.

9. But, assuming that an examination of the minutes and the statements of the committee disclose a legislative purpose, still that purpose may have been vitiated by subsequent legislative history. The Journal must be consulted to determine, for example, whether any or all of the amendments offered by the committee were adopted. Rejection of certain amendments may radically change the purpose evidenced by the Committee records. The same is true of amendments which are offered from the floor and adopted. These too are reported in the Journal. Unfortunately, however, in the consideration of bills on General or Select File, amendments offered but not adopted are not entered in the Journal, except when a record vote is demanded.¹²

10. Amendments are also offered by the Enrollment and Review Committee. These are entered in the Journal, and although the function of the Committee is merely to recommend changes relative to arrangement, phraseology and correlation, amendments offered by the Committee and adopted by the Legislature may in fact have created a substantive change in the bill. This Committee also considers the bill when it has been advanced from Select File and referred to it for engrossment. Here again similar changes may be made which should be noted.

11. Another source of legislative history which may be found in the Journal are the messages of the Governor. By rule the Clerk must "enter in the daily journal all messages of the Governor in full."¹³ Thus, if the bill of which the section in question is a

¹¹ Rules of the Nebr. Legislature (1947) Rule 6, § 5. These records have been filed in the office of the Clerk of the Legislature since the first unicameral session convened in 1937. Records of committee proceedings for the bicameral sessions are incomplete. Those available are filed in the office of the Secretary of State, but since the rules of the bicameral legislature merely required that a record be kept of the vote in the committee, they indicate only the date, the bills considered on that date, and their disposition.

¹² Rules of Nebr. Legislature (1947) Rule 8, § 4.

¹³ Rules of the Nebr. Legislature (1947) Rule 8, § 2.

part was recommended, or its introduction requested by the Governor, the Journal should be consulted to determine if the request or recommendation was the subject of a message from the Governor, or a part of his inauguration or appropriation message.¹⁴ Similarly, if the bill was passed by the Legislature and vetoed by the Governor, a message may have accompanied the bill when it was returned to the Legislature, giving the reasons for his disapproval. If this were the case, passage, notwithstanding the Governor's disapproval, might indicate a reaffirmation of the Legislature's purpose, or a repudiation of the objections to or the interpretation of the bill by the Governor.

12. The materials in the office of the Legislative Council constitute still another source of legislative history. The Council was established in 1937 and given the duty to collect information of state-wide public importance, to present a legislative program to the Legislature and to establish and maintain a bill drafting, reference and research service. Thus, if the subject matter of the bill, of which the section in question was a part, was the subject of a study and report by the Council, the Council's report to the Legislature might be of aid in resolving the meaning of ambiguous legislation.¹⁵ The drafting service of the Council is a continuation of the work of the earlier Legislative Reference Bureau, and in this respect its drafting records are a continuation of the drafting records of the Bureau. These records extend back to 1925 and consist of a separate file for each legislator in each session. These individual files contain the requests made by individual legislators for drafts of proposed legislation, as well as the subsequent work of the bill drafter. Some requests reflect the intent of the legislator requesting the draft. For example, the request for a specific draft may be a letter from a city attorney of a certain town asking that a bill be introduced to amend the statute which restricts his town from extending its power lines beyond a certain mile limit. The letter may explain in what manner the statute is hampering the town and what limit will accommodate its proposed expansion. On the bottom might be a notation by the legislative member to draft a bill to cover the requested change. Or, a file might contain a memorandum from a state department head to a Senator explaining the effect of an Attorney General's opinion on his office, and requesting that a bill be introduced to remove the disability. Each of these examples sheds light on the original purpose of the introducer of the bill, and, assuming the bill was

¹⁴ Messages of the Governors also appear in a special publication of the Nebraska Historical Society. *Messages and Proclamations of the Governors of Nebraska—1854-1942*. (4 volumes, with index in volume 4)

¹⁵ The Council's reports are filed in the Research Department of the Legislative Council.

not materially changed during its passage, this might be accepted as the purpose of the Legislature.

13. To this point, the hints on finding the history of legislative enactments have been concerned with the legislative history surrounding the original bill which was enacted, and subsequent bills which, when enacted, amended the original act. Nevertheless, unsuccessful attempts to amend the act might well reflect legislative purpose in the same manner as does the rejection of individual amendments of a later enacted bill. The difficulty, however, is in finding the bills which were disapproved. The Journal covers the steps in the progress of a legislative measure until it was defeated, but unless the session is known, there is no convenient way to learn the legislative number of such a bill. If the session in which the bill was introduced is known, however, the General Index of the Journal will furnish a lead to the number of the bill,¹⁶ and once this is known the minutes of the committee, etc., can be found.

14. The remaining suggestion pertains not to ambiguous legislative enactments but to sources of legislative history relating to provisions of the Constitution of Nebraska. Nebraska has had five constitutional conventions. The Convention of 1864 adjourned without framing a constitution; the Convention of 1866 framed Nebraska's first constitution; the Convention of 1871 drafted a document which was defeated at the polls; the fourth convention was held in 1875 and framed our present constitution as amended by the 1919-1920 Constitutional Convention. The minutes of the 1875 Convention were lost and only the Journal is available. The minutes of the 1871 Convention plus the Journal of the 1875 Convention and historical accounts of the 1864 and 1866 Conventions have been published in a three volume set by the Nebraska Historical Society.¹⁷ The record of the proceedings of the 1919-1920 Convention is complete and was compiled and published in two volumes under the authority of the convention.¹⁸

Problem E:

Assume that, pursuant to section 72-710 of the Revised Statutes of Nebraska (1943), the University of Nebraska's heat-

¹⁶ In addition to the general indices found in the Journals, two bound indices to legislative bills were published by the Legislative Reference Bureau. The two volumes contain a separate subject index for each house of each session of the Legislature between 1915 and 1935 inclusive, and although not a general compilation of the subjects of bills introduced over this twenty year period, the separate subject indices are more detailed than the general indices found in the Journals.

¹⁷ Vol. I (1906); Vol. II (1907); Vol. III (1913). The first two volumes were revised and edited by Addison E. Sheldon; the third volume was revised and edited by Albert Watkins.

¹⁸ Proceedings of the Constitutional Convention—1919-1920.

ing plant had served for a number of years as a standby source of electric power for the State Capitol building. The operating superintendent of the University reports to the Board of Regents of the University of Nebraska, that, due to the increased electric power consumption on the campus resulting from the addition of new campus buildings, it is doubtful if the heating plant can continue to supply standby power to the Capitol building unless the plant is expanded. The Board discusses the cost of expanding the plant, but it decides that other building commitments make this course of action impossible if it is to operate within the limits of the existing appropriation. Thereupon, the Board, upon suggestion of one of its members, refers the matter to you, its legal counsel, with instructions to determine whether the University under the existing law is legally obligated as a matter of duty to continue to furnish this power.

Prepare a memorandum opinion to be presented to the Board of Regents, using among other things the available materials of legislative history. If in addition to Barlow's "Hints on Finding and Utilizing the History of State Legislative Enactments in Nebraska," you wish some knowledge of the mechanics involved in the enactment of a legislative measure in the state—on the theory that it might give some clue as to where to look for evidences of "purpose" or "intent"—see Barlow, "Outline of the Stages for the Enactment of a Law by the Nebraska Unicameral Legislature," *infra*. p. 315.

Problem F:

Assume that the County Board of Kimball County, Nebraska, voted at a regular meeting of the Board to award to the Bild-It Construction Company a \$2750 contract for remodeling the courtroom in the County Court House. Assume further, that the Board notifies the Company of this award and requests that a representative of the Company be present at a meeting of the Board the following week to sign the contract. Before this scheduled meeting, however, Smith, a general contractor who had submitted a lower bid for the work, brings an action for a temporary restraining order directing the County Board not to enter into the proposed contract. Smith's position is that the vote to award the contract to Bild-It is contrary to section 23-324.05 of the Revised Statutes of Nebraska (1943), because sealed bids for the remodeling work were not solicited by public notice. The order is granted and a date is set for a hearing to show cause why the restraining order should not be made permanent. (Smith hopes that, by nullifying the Board's action, it would reopen a new round of bids.)

(a) Notice of the scheduled hearing is given to the Board,

and the county attorney requests you, his assistant, to prepare a legal memorandum on the sole question of whether the statute in question is applicable to the given set of facts, using, among others, available materials of legislative history.

(b) Follow the directions of (a) *supra*, except that you are an associate member of the firm representing Smith, and are called upon to write a legal memorandum, for possible inclusion in a brief to the court, in support of Smith's position.

CHAPTER 3

THE DRAFTING OF LEGISLATION

A. INTRODUCTORY NOTE

Often a lawyer is called upon to assume the role of legal architect—that of designing a completely new edifice, or remodeling an old one. For either task, he must be thoroughly familiar with the state of law—judge-made or otherwise—pertaining to the subject; he must know precisely what is wrong with it, i. e., the deficiencies in scope and coverage, and in the control machinery; he must know whether anything at all can be done by way of legislation to remedy the deficiencies and if so, be able to gauge the efficacy of the remedy; he must also know whether there is power to apply it. But his task at this juncture is not yet completed. Once he has hit upon the remedy and has resolved the question of power, he must have the skill to embody the remedy in language expressed and arranged so articulately as to make the purpose and method of the legislation clearly understood—not only by those who would be affected by it, but also by those who would administer it. Care in the drafting stage will help minimize time-consuming conflicts over legislative “intention” in the judicial arena—“minimize,” because no matter how exacting one is in the use of legislative language, there will usually be a residue of uncertainty and ambiguity requiring resolution by the courts. There are at least two reasons for this: (1) the difficulty of foreseeing all of the possible consequences of legislative language in its relation to persons and situations to which it might apply; and (2) the reluctance of courts in some instances to be hemmed in by words—no matter how articulate—because, for policy reasons, they wish to arrive at a certain result. But to acknowledge that courts sometimes ignore legislative language and create ambiguities where none actually exists is not to say that it is useless for the draftsman to pursue the ideal of clear expression. If the legislative language is ambiguous, the court cannot, of course, be criticized for trying to pour meaning into it. But if the meaning of the language is unmistakable and the court nevertheless takes liberties with it, clear expression can again be used—often with telling effect—in registering the legislature’s displeasure with the court’s action. For the court, under our doctrine of separation of powers, must ultimately bow to clear legislative command—assuming, of course, that in the particular situation there is constitutional power to legislate.

Once, then, the purpose of a legislative proposal is made evident, the draftsman must strive to tailor precise legislative language that will fit the specific situations and parties intended to be encompassed, and the specific means-end machinery intended to be used. In many instances, it is difficult, if not impossible, to be quite so specific—making it necessary to delegate to courts or administrative agencies the authority to make some of the necessary refinements. Such, for example, was presumably the case when the court was given the job of spelling out the meaning of “monopoly” and “restraint of trade” under the Sherman Act, and when the Federal Trade Commission was empowered under the Clayton Act to determine the specific situations which the standard of “unfair competition” would encompass. But even in such cases, however, the general purpose to be achieved must be set forth in legislative language so articulate that those who are entrusted to make such refinements will further that purpose, and not defeat it.

These general standards of proper draftsmanship are, of course, comparatively simple to state, but the task of applying them to specific problems is fraught with many difficulties. Let us see whether the following materials will be of some help in minimizing them.

B. BACKGROUND MATERIALS

ALFRED F. CONARD, NEW WAYS TO WRITE LAWS¹

56 Yale L. J. 458, 469-478, 481 (1947)

* * *

A Restatement of Objectives

The tricks that make a law easy to understand are countless. Many of them are subtle as the touches that make good style in essays, short stories, and every other kind of literary creation. What is essential is that the writer should really want his readers to understand what is commanded and what is forbidden by the law. His object is different from that treated in books on composition, which seek an appeal to the cultivated literary taste; they strive for a certain sophistication and subtlety which may mystify while it charms.

The law-writer's object is more like that of the man who writes directions on how to use a Kodak or how to operate a Burroughs calculator. He may be addressing a very alert and eager audience, but he wants to be understood with as little effort as possible. And he wants above all to prevent his reader from throwing down the directions in disgust.

¹ Reprinted with the permission of the author and the Yale University Press.

How technical he will be should depend on his audience. A statute on judicial procedure may properly use phrases that lawyers alone can comprehend, and sentences as complex as those in legal treatises and law reviews. But there is no excuse for using sentences which he would be ashamed to put in a bar association committee report, addressed to the same audience.

Postal regulations should be a good deal simpler. Here is an essentially good sentence from a recent law on what can be mailed:

"Pistols, revolvers, and other firearms capable of being concealed on the person . . . shall not be deposited in or carried by the mails . . ."

Laws on restraint of trade should be pitched to the reading level of average business men. The draftsman of a law like the Robinson-Patman Act should ask himself whether it would make a good circular to the buyers of a large merchandising organization like Sears Roebuck. If it would not, it is a poor device for inducing business men to change their ways of buying and selling.

Internal Revenue laws and regulations may be pitched to several different levels. Those which apply to small individual incomes need to be on a very simple level. The excess profits tax law, on the other hand, had every reason to be more complex; it would be used almost exclusively by accountants. But there was no excuse for writing it in such terms that a bulletin of several hundred pages had to be issued to tell the accountants how to apply it. The text which the accountants could read should have been the text of the law.

* * *

What the Act Is About

The first thing that any law-reader wants to know is what the law is about. Does it affect him or doesn't it? Most laws fail so utterly to answer this question that they are likely to be thrown in the waste basket before the reader even tries to decipher them.

A typical example is the Trading with the Enemy Act, which in time of war suddenly applies to tens of thousands of Americans. But if it came in the mail to an American who was about to send money to a foreign creditor, he would have to parse two or three pages before he found out whether he was likely to be affected by it.

The first thing the citizen would notice is that the Act begins with section 2 (maybe section 1 got lost, he thinks). Section 2, which has no subtitle, contains a long list of definitions, starting with a half-page definition of "enemy."

Somewhere in the middle of the second page begins section 3,

also with no subtitle. If the citizen is still looking, he will see—

That it shall be unlawful—

(a) For any person in the United States, except with a license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, either directly or indirectly, with, to, or from, or for, on account of, or on behalf of, or for the benefit of any other person . . .

If he keeps on for a few lines more, and understands what he reads, he will at last find out what the law is about.

A better way to start a statute is suggested by the way OPA finally learned to open its price regulations. It learned by experience to start them this way:

“This regulation fixes ceiling prices for sales by retailers of certain commodities.”

The same approach could have been used in the Trading with the Enemy Act:

“This law applies to everyone in the United States who has any dealings with foreigners.”

It could then have proceeded to explain what foreigners and what dealings were specifically affected.

Where an act is addressed chiefly to public officials, rather than to citizens, the important thing is to set out the moving purpose behind the statute. The Employment Act of 1946 (originally proposed as the Full Employment Act of 1945) starts with a declaration of the national “policy and responsibility” to provide for employment through free enterprise. This tells the purposes with which the later sections (which can never provide for all eventualities) should be carried out.

Guide Lines

Another simple means of enticing the reading public into the heart of a statute is to put headings on the various subdivisions. A citizen who tackles an official print of the Trading with the Enemy Act to find out which if any of its provisions affects him finds twenty-five pages of closely printed text unadorned by a single guide line. . . .

This sort of thing is so obviously unenlightening that no compilation of laws is ever published without the compiler adding boldface titles to the various sections in order to guide the reader around. The official United States Code provides the following guideposts:

- “Section 1. Designation of Act.
- 2. Definitions.
- 3. Acts prohibited.
- 4. Licenses to enemy or ally of enemy insurance

or reinsurance companies; change of name; doing business in United States.

5. Suspension of provisions relating to ally of enemy; regulation of transactions in foreign exchange of gold or silver."

Compilers' headings are seldom carried below the main section headings, but occasional statutes carry useful captions down through the subsections and paragraphs. Internal Revenue legislation has been particularly forward in this direction, . . .

Cutting Out the Jargon

One of the things that annoys readers in legal writing is the tireless repetition of words that do not need to be repeated. "Such," "aforesaid," and "hereinbefore" are the most familiar offenders.

* * *

"Such" and its companions can be got rid of simply by dropping them. A slightly harder problem is presented when the law-writer has to use two or three different terms, and finds himself, repeating them again and again like leit-motifs in a Wagnerian opera. Here is an example of this fault, with one of the recurrent themes put in italics, and the other in capitals:

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be *filed, registered, or recorded* in any office for the *filing, registering, or recording* of CONVEYANCES, TRANSFERS, or ASSIGNMENTS of any such property or rights as may be covered by such requirement (including the proper office for *filing, registering, or recording* CONVEYANCES, TRANSFERS, or ASSIGNMENTS of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so *filed, registered, or recorded* shall import the same notice and have the same force and effect as a duly executed CONVEYANCE, TRANSFER, or ASSIGNMENT to the Alien Property Custodian so *filed, registered, or recorded*."

This paragraph could have been written as follows:

"Any order under this Act, or a certified copy of it, may be filed in any office for the filing of other transfers of the same kind of property. The effect will be the same as for any other transfer. 'Filing' includes registering and recording; 'transfers' include conveyances and assignments; 'property' includes patents, copyrights and trademarks."

Short Sentences

One of the hardest things for a lawyer to do is to write short sentences. . . .

. . . Most sentences start short, and grow longer as each

member of a legislative committee adds ideas. After a couple of additions, the sentence needs to be split into two. Any draftsman would split it in a letter, but not in a statute, because that would make him repeat the subject and verb. The statute appears to take less space in one sentence than in two.

What the draftsman forgets is that the reason for brevity is to avoid tiring the reader. Most readers find one sentence of eighty words more tiring than five with twenty each. The thing to keep down is not the number of lines of type, but the reading time. The easier the style, as Readers' Digest knows, the shorter the reading time.

Giving Examples

Another tradition which discourages citizens from reading laws is the draftsman's habit of describing his subject in the least specific terms he can find. An example of this approach is furnished by a bill in the last Congress which provided:

"That hereafter, except as otherwise specially provided by Act of Congress, no action for the recovery of wages, penalties or other damages, actual or exemplary, pursuant to any law of the United States shall be maintained in any court unless the same was commenced within one year after such cause of action accrued: . . ."

The only way a lawyer can know whether the one-year limitation of this law applies is to search the United States Code from stem to stern. If he can't find a limitation anywhere else, then this is it.

A catch-all limitation may be a good thing, just to cover the unknown and forgotten cases. But this wasn't that kind of a law. The draftsman knew precisely what actions he wanted to limit, and he listed them, with citations, in the Committee report. If he had listed them in the statute, he would have saved hours of research for thousands of lawyers. Why didn't he? Possibly he prided himself on the brevity of his product, occupying a minimum of space in the Statutes-at-Large, but consuming a maximum of other lawyers' time and making it likely that some would be misled until, on an appeal, a more resourceful opponent produced the Committee Report and showed what the legislators really "intended." More likely, he did not think at all. He simply followed the legal tradition of using vague, general terms instead of specific ones. If the draftsman had wanted to enlighten his reader, he would have written—

"The following actions must be brought within one year after the cause of action accrued:

- (1) Suits for treble damages based on infringement of a registered trademark (17 U. S. C. § 25);

- (2) Suits based on infringement of copyrights (17 U. S. C. § 25) ;”

and so on down the list.

Later in the same bill occurs another provision of unenlightening vagueness:

“Provided further, That no liability shall be predicated in any case on any act done or omitted in good faith in accord with any regulation, order, or administrative interpretation or practice, notwithstanding that such regulation, order, interpretation, or practice may, after such act or omission, be amended, rescinded, or be determined by judicial authority to be invalid or of no effect.”

No doubt a lawyer can sit down and figure out some of the situations to which this provision might apply, but they are not immediately evident. A layman would be unlikely to figure them out at all.

The reason for leaving the reader in the dark is not the difficulty in explaining the situations, for they were very lucidly set forth in the Committee Report:

“A good illustration arises from the operation of the Fair Labor Standards Act. An employer who violates the provisions of this law relating to wages or hours may be subjected to suit for twice the amount involved together with costs and attorney fees. The application of this law has been greatly extended by administrative regulations. As a result an employer who may have, in good faith, relied upon a certain ruling, regulation, or practice, suddenly finds himself confronted with many suits, when a change is made either by the Administrator or by the courts. The enforcement of this new liability dating back to the enactment of the law would in many cases bankrupt the employer.”

This problem cannot be solved . . . by listing the situations where the law applies, because they are innumerable. If the draftsman were to say “no liability shall be predicated in the following situations—,” and list only some of them, he would run the danger of implying that it does exist in the other situations.

But there is a simple solution. Give an example and call it an example. Below is a passage from an OPA regulation where a hard-to-read legal provision is given concreteness by an illustration of how it works:

“Rule 3: . . . If the article you are pricing has a net cost lower than the lowest net cost listed for that category in column 2 of your chart, you figure your maximum price by applying to the net cost of the article the percentage markup listed in Column 4 for the lowest net cost shown for that category.

Example 6: You wish to price a girl's sweater costing \$1.94 net. The lowest net cost which you have listed for category 208 is \$2.07, for which you have a listed percentage markup of 55.6%. Therefore your maximum price is \$3.02. ($1.94 \times 0.556 = \1.079; $\$1.94 + \$1.079 = \$3.019$.)"

The rule of law is hard reading; with the example, a merchant can see what it means. If examples can be used in regulations, which have the force of law, they can also be used in statutes. When they are, many more citizens will understand the law.

Giving Directions

Law-writers are usually talking about who shall go to jail, and what epithet shall be applied to him. "Every person who shall do such and such shall be deemed guilty of a misdemeanor and shall be punishable . . ." Or else they seem to be engaged in making preposterous predictions like "No person shall make any agreement. . . ."

What the citizen wants to know is not how to get in jail but how to stay out. It seems more logical to him to say "Persons must not do such and such." This is the style of the Ten Commandments, which are good examples of direct speech to the common citizen.

In complex laws, this oblique approach of the law-writer is a real obstacle to understanding. Consider, for example, the confusion of the ordinary taxpayer if he had to figure out his income tax by reading the Internal Revenue Code and regulations. Fortunately, he does not even attempt it. He reads the form and the instructions. And this is all the Bureau of Internal Revenue expects him to do.

Since that is what the Bureau expects, a sensible internal revenue law would ask him to do just that: "Every person who received more than \$500 in a year, and not more than \$3000, must fill out form 1041A, according to the instructions that go with it. He must also pay the tax which is shown by the form, when properly completed. Form 1041A for 1947 is as follows. . . ."

Any criminal code contains examples of both types of laws—those which tell the judge what he should think about . . . if a man is brought before him charged with certain acts, and those which tell the citizen what acts he must refrain from doing.

Here is an example of the first method:

"Whoever shall enter, remain in, leave, or commit any act in any military area or military zone . . . shall, . . . be guilty of a misdemeanor and upon conviction shall be liable to a fine. . . ."

This tells what a law lecturer would presumably want to know about a crime—what it is called, and when a man is guilty of it.

"Pistols, revolvers, and other firearms capable of being concealed on the person . . . shall not be deposited in or carried by the mails. . . ."

This tells the citizen what he is not to do.

The former approach illustrates another habit of draftsmanship which reveals the workings of the draftsman's mind. He is not thinking about telling the citizen what not to do, but about telling the judge what to do with the offending citizen.

* * *

Conclusion

Laws should be written with more emphasis on making readers understand what the law commands, and with less emphasis on controlling the judges by rigid grammatical constructions. Judges are more likely to be controlled by clear statements of purpose.

Many ways of making laws more readable are already in use. They should be brought into the open, to be more widely adopted if valid and abandoned if unsound. The law needs a literature on how to write laws that is not contained in present treatises on statutory interpretation.

ROBERT K. CULLEN, MECHANICS OF STATUTORY REVISION—A REVISOR'S MANUAL (1944) ²

24 Oregon L. Rev. 1, 13-21³

. . . statutes should be phrased in modern, everyday language. Laymen who have a decent command of English and are capable of clear expression in business writings have a firm conviction that legal writings must contain certain formulas of the trade, so to speak; and when those laymen endeavor to draft statutes they fill them with all the hocus-pocus words and phrases that they associate in their minds with the law. And the lawyers probably are worse offenders. In drafting a statute the lawyer will lean back in his chair, prop his feet on his desk, and dictate to his stenographer, throwing in all of the hackneyed couplets, phrases, and timeworn legal expressions that pop into his mind—either because he thinks he is displaying his knowledge of the law or because he is too lazy to employ some words of his own. The ordinary citizen is required to observe the law. Why shouldn't it be phrased so that he can understand it?

The same word should always be used to express the same sense. Literary beauty should be sacrificed in favor of clearness.

² [Ed.] Although Mr. Cullen's article is primarily concerned with "statutory revision," the parts that are reproduced here are particularly valuable as guides for ordinary legislative drafting.

³ The selected footnotes have been renumbered.

The substitution of words to break the monotony of phraseology will inevitably lead to confusion. For the same reason, the same word should not be used in different senses, and synonyms should be avoided. If two words have the same meaning the use of both is rank tautology.

The statutes should be written in the present tense, for the law is intended to speak in the present. For some reason, legislative drafters have fallen into the vicious habit of using the future conditional tense. They write, "if any person shall violate this Act he shall be fined," when it could so easily be said, "any person who violates this Act shall be fined." Or they use "if it shall appear" in place of "if it appears." And "any person who shall attempt" in place of "any person who attempts." And "if it shall be necessary" in place of "if it is necessary." The present tense is not only more understandable but requires fewer words.

Rhetorical flourishes and ornamentation should be avoided. Statutes should be sober, calm, and dispassionate.

Repetition should be studiously excluded. Nothing need be said doubly or trebly. If a thing is said once and then repeated, the courts, which must presume that the legislature would not do a vain or foolish thing, will endeavor to ascribe some different meaning to the repetitious language.

Never use a phrase when a word is its exact equivalent. An adjective or an adverb is better than a phrase that means the same thing. Phrases produce prolixity and frequently separate the grammatical subject from the grammatical predicate.

Nouns should be used in preference to pronouns, even though the noun has to be repeated.

Use the active rather than the passive form of the verb, because it is stronger and more positive.

Avoid whenever possible the practice of introducing nouns, verbs, adjectives, and even conjunctions by pairs.

* * *

The confusion in statutes often arises from sloppy grammatical construction. . . .

An enactment in its simplest form is a declaration of the legislature, directing or empowering the doing of, or directing the abstention from doing, a particular act or thing. Such an enactment consists of a legal subject and a legal action (predicate). A more complex law includes in addition cases and conditions. Proper sentence structure depends upon a comprehension of these four parts and upon their arrangement in the correct order.

The description of the legal subject determines the extent of the applicability of the law, and if the law is to be clear and certain the description of the subject must be accurate. In the

personal form, the subject is the person who is directed or empowered to do or prohibited from doing the thing mentioned. In the impersonal form it is the thing to be done or left undone. Generally it is better to use the personal form, except where there are several classes of persons who would constitute the subjects and their description or enumeration would necessitate repetitious or awkward form. In such cases the use of the impersonal form "it is unlawful" or "it is lawful" is permissible, if it does not make the law indefinite. The impersonal form should be avoided because it encourages the use of the passive form of the verb, a much weaker construction than the active form.

When it is necessary to use descriptive language to state the legal subject it is preferable to use the present or historic present tense of a verb rather than the future or imperative forms of a verb. For example, "the term 'employer' means," rather than "the term 'employer' shall mean."

A number of legal subjects may often be grouped, for example:

"The following persons:

- (1)
- (2)
- (3)
- shall"

The legal action declares that the legal subject may or shall or shall not do certain acts, or, in the impersonal form, it expresses what is enacted with respect to the thing to be done or left undone. The legal action should be expressed in such a way as to make it stand out. Ordinarily the words "may" or "shall" should not be used in any part of the law except the legal action. The legal action should follow closely the legal subject, without the intervention of exceptions, provisos, or conditions. A number of legal actions may be grouped as follows:

"The county judge may:

- (1)
- (2)
- (3)"

The legal subject and the legal action, together, form the declaration of the law. When it is necessary to limit the extent of the declaration, or to describe the instances when the law is to operate, there should be a statement of the case to which the law applies. By this method the necessity of saving clauses, provisos, and exceptions may effectually be decreased. Usually the case should be stated at the beginning, preceding the declaration, and should be introduced with words such as "where," "when," "in the event of," "in case," or "if" with the indicative. Where a section begins with such words it is fair notice to the reader that the law is limited. Occasionally it may be more convenient, where

a single declaration applies to numerous cases, to place the declaration first, followed by a list or schedule of the cases. However, the list of cases may precede the declaration, as follows:

"In case:

- (1)
- (2), or
- (3)

the court shall"

The case must always be so expressed as to be clearly distinguishable from the other parts of the sentence, but it need not, and should not, be comprised in a consecutive sentence where rules of composition require a different arrangement. The present tense of the verb should be used to describe the case, since the future is easily confused with the imperative.

Laws may often be called into action only upon the fulfillment of certain conditions. The logical position for the condition is directly after the statement of the case. Where there are several conditions it is good draftsmanship to enumerate them in the chronological order in which they are to be performed.

The condition clause should begin with "if," or, when the clause is negatively stated, with "unless." The greatest caution must be used in putting the clause in negative form, since it makes the performance of the condition a matter of absolute necessity. If the affirmative expression is used, the court will consider the statement of condition to be directory only. Here again, the future form of the verb should be avoided.

Placing the condition clause following the case and preceding the declaration will facilitate accuracy in expressing the law. Often it will seem easier to state the declaration and then run in the qualifications at the end in the form of provisos or exceptions. But in so doing the purpose of the proviso is perverted for that is stated as an exception which is in fact a condition applying to the whole law. It should be remembered that in most cases a condition defines the circumstance in which the law shall be called into action.

The enumeration of case, condition, subject, and action seems to make no provision for exceptions, but it should be borne in mind that a correct statement of case and condition will often eliminate the necessity for exceptions. Where exceptions are required in addition to the case and condition, they should be placed at the end of the section, or even in a separate section. Where the application of a law is general, with a single well-defined exception, and no statement of case or condition is required, the exception may be placed at the beginning of the section, preceding the declaration. The word "except" may be used in introducing exceptions, but care must be taken to avoid its use where it is likely to lead to ambiguity. Only such

substantives should follow the word as are intended to be governed by it.

* * *

If there is one practice that should be condemned, it is that of tacking every conceivable kind of provision at the end of a sentence or section, introduced by the magic words "provided, however, that." This most frequently happens in the case of amendments to existing statutes. The drafter of the amendment is too lazy or too ignorant to rephrase the statute to properly embrace the amendatory provisions, so he just adds them on the end. The thing added may be an exception, a condition, an additional declaration, or even a statement that directly contradicts a provision of the existing section. But the use of such perverted provisos is not limited to amendments; they frequently appear in original legislation. The practice has become so widespread that one would be led to believe that any clause or sentence other than the one which introduces a section is not grammatically complete unless it begins with the words "provided, however, that."

What is the reader to think? He should be entitled to think that the proviso is an exception or exemption to what has gone before, but in many cases it simply could not be that if it is to make sense. Sometimes it is obvious that it must have been intended to be a condition. In other instances it probably was meant to limit the case to which the declaration applies. In either event the reader is left to guess what the drafter meant.

The function of provisos is to make a special exemption from a general statutory declaration, and they should be confined exclusively to that function.

* * *

Probably the most common fault of legislative drafters is the persistent, imitative repetition of the words "such," "said," and "aforesaid." As far as clearness is concerned, the words ordinarily do not cause any confusion, but they unnecessarily clutter up the sentences and induce the use of other legal idioms that do cause ambiguity. The lawyer who would never think of using "such" or "said" in ordinary conversation or correspondence will automatically throw the words in when he prepares a legal paper. And the layman thinks that using "said" and "aforesaid" liberally in everything he writes will add a distinct legal flavor. It is time to put a stop to the practice.

It is probably unnecessary here to caution the revisor with regard to the use of "and/or." It has been so often and so firmly denounced by the courts that no further condemnation is needed.

The revisor should avoid use of the word "construed." In most cases the word "means" should be substituted. Isn't it

much more simple for the legislature to say what its language means rather than to direct the courts to place a particular construction upon its language?

"If" is usually better than "whenever."

"Any" is usually more accurate than "every."

"Is" should usually be substituted for "be."

"Duly" is often unnecessary.

"Respectively" is usually unnecessary.

"Either directly or indirectly" is usually unnecessary. If the statute clearly states that no person shall do a certain thing, it surely means what it says, and it is not necessary to add, "either directly or indirectly, by artifice, scheme, subterfuge, device, or trick." If one law contains an "either directly or indirectly" clause, and another law does not, could anyone contend that the second law could be violated indirectly with impunity? The same is true of the words "whether or not." If the statute makes a flat prohibition, what is added by a clause stating in effect that the prohibition is intended to apply regardless of certain circumstances?

Always avoid a phrase that attempts to explain a general word; for example, "evidence, documentary or otherwise." If the word is intended to be general, any explanation or description cannot make it more general, and may have the effect of a limitation or restriction.

Where the intention is to limit or restrict an antecedent, the word "that" and not "which" should be used. "Which" is descriptive and may not be construed as restrictive in some cases where a restriction is intended.

"Party" should not be used as a synonym for "person." Let "party" be confined to cases where the reference is to parties to an action.

Words defining a crime are not usually necessary; for example, "shall be guilty of a misdemeanor," or "shall be deemed to be guilty of larceny." If the punishment is set forth, what difference does it make what the crime is called?

Great care should be exercised in using the phrases "except where otherwise specifically provided" and "as provided in this act." Both are indefinite and raise constant questions as to the application of the section.

Don't use "hereinbefore," "preceding," or "following" in making reference to other sections, because the position of sections is frequently changed and because the words do not indicate the limits of the material referred to. Where reference is necessary, refer to the section by number.

Since a great majority of statutes consist of declarations that a certain thing be done or not be done, or authorizations

that certain things be done, it is apparent that imperative and permissive verb forms will constantly be used. "Shall" and "shall not" are imperative, "may" is permissive. Substitutes for "may" or "shall" are mere verbiage, and phrases attempting to amplify them, such as "shall and he is hereby directed to" or "may, in his discretion," are purely redundant. The words "may" and "shall" should not be used in any part of the law except the legal action unless it is absolutely necessary.

There are a number of common couplets and phrases used by attorneys that should be avoided. For example:

Avoid	Use
ordered, adjudged, and decreed	adjudged
sole and exclusive	exclusive
fail, refuse, and neglect	fail
constitute and appoint	appoint
null and void, and of no effect	void
bonds, notes, checks, drafts, and other evidences of indebtedness	evidences of indebtedness
trustees of trust estates created by will, or by contract, or by declaration of trust, or by implication of law	trustees
absolutely null and void	void
is defined and shall be construed to mean	means
is hereby authorized and it shall be his duty to	shall
is hereby authorized and empowered	may
is hereby vested with power and authority and it shall be its duty in carrying out the provisions of this act to	shall
be and the same is hereby	is
it shall be lawful	may
it is its duty to	shall
are hereby required to	shall
the place of his abode	his abode

* * *

Clearness and economy of expression can frequently be achieved through the use of definitions. Definitions serve two purposes: first, to ascribe a particular meaning to a term that must appear several times in the law and that does not, by itself, clearly convey the full meaning intended,⁴ or limit the meaning of a term that, undefined, would have a broader meaning than intended;⁵ and, second, to furnish a sort of abbrevia-

⁴ For example "‘sharp curve’ means a curve of not less than thirty degrees."

⁵ For example, "‘Vehicle’ includes all agencies for the transportation of persons or property over or upon the public highways excepting road rollers, farm tractors, and those vehicles propelled by electric power obtained from overhead wires."

tion for a lengthy name or description, the frequent repetition of which would involve the use of a good many words.⁶ Often the repetition of an enumeration of particulars may be avoided by use of a generic term which is defined in the definition section.⁷

A word of caution should be given, however, with regard to the use of definitions. In recent years there seems to have developed a tendency, particularly in Federal legislation, to insert a mass of definitions that are not only unnecessary but sometimes are confusing and misleading. In some instances the words or terms defined do not even appear in the law. In other instances a word that is used only once in the law is defined in the definition section, when it would have been much more simple and convenient to clearly express the meaning by adding a few words to the section in which the word appears.

If the word has a definite dictionary definition, there is no need to repeat that definition in the statutes. And a word that ordinarily means one thing should not be defined to mean something else. As a general rule definitions should be sparingly used—the fewer definitions the better.

* * *

Repetition of lengthy details of procedure can frequently be avoided through the adoption by reference of a standard procedure. This is particularly true in the case of laws relating to eminent domain and laws relating to issuance of revenue bonds for various projects. If a standard general procedure is set forth in one law, it can be adopted by reference to supply the procedure for another similar law.

However, the greatest caution should be exercised in referential legislation. Reference should not be made in one act to another separate act unless the act referred to is a general one adaptable to incorporation by reference. The incorporated act should not be deviated from or modified. The referential legislation to be avoided always consists in referring in one act to the provisions of another act which do not readily lend themselves to incorporation and require referential modification before they can be made to harmonize with the incorporating act. An act should not be adopted by reference if the matter expressed in the act so adopted could as easily be expressed as the reference, and in as few words.

Never should an act be so drawn that it cannot be understood without referring to another act.

⁶ For example, "‘Commissioner’ means the Commissioner of Agriculture, Labor, and Statistics." Or, "‘Company’ means any corporation, association, or society transacting a life or casualty insurance business, or both, on the cooperative or assessment plan."

⁷ For example, "‘Public authority’ means any officer, board, or commission of this state, or any political subdivision or department thereof in the state, or any institution supported in whole or in part by public funds."

REPORT OF COMMITTEE ON MINISTERS' POWERS

Cmd. 4060, 135-137 (1936) *

In the absence of any guidance beyond the words of the statute itself, I venture, therefore, to doubt whether the judge has in fact a sufficient clue to the policy which is behind the legislation. * * *

* * * If statutes do not plainly avow their intention by their words, the desirable thing is, I submit, to attach to them an authoritative explanation of intention. This could be done in one of two ways: (1) as was so often the case in the Tudor period, by way of preamble to the statute itself. There would here be set out, as clearly as draftsmanship will permit, the end the statute has in view; or (2) by way of memorandum in explanation of the statute. It is well known that it has become increasingly the practice in modern legislation to issue to members of Parliament a memorandum in explanation of any complex legislation that is laid before them; * * * The value of these memoranda is great; and they would, I suggest, be of real assistance to the judge in discovering the purpose the statute is intended to serve.

Objections to this course are, I understand, urged on several grounds. It is said that a preamble is, strictly, without legislative force, since it is merely a guide to the meaning of a statute. This is, of course, true; but it is at least an authoritative guide which, in the hands of a competent draftsman, could hardly fail to be an instrument of clarification, a good means, as Coke put it, for collecting the intent, and showing the mischiefs which the makers of the Act intended to remedy. It is argued, further, that the memorandum of explanation sets forth the purposes of the Bill as it leaves the Department in which it originated. The Bill may be changed in Committee or on Report; and since it is, in any case, no part of the statute, by our rules of interpretation, it would have no standing before the Courts. But on the first point I confess that it does not seem to me beyond the wit of a man, and certainly not beyond the wisdom of a Department, to issue a revised memorandum after a Bill has gone through all its stages, in which account is taken of the changes which discussion has made. Upon the second, it seems to me that authority could be conferred upon the judges to utilize the memorandum in their work of interpretation. I am not, be it noted, asking that they should be so bound by it that they have no alternative but to accept its terms; I am suggesting only

* Although this Report deals primarily with the problem of the expansion of administrative government in England, these excerpts from a separate note prepared by Harold J. Laski, one of the members of the Committee, are concerned with an important phase of legislative drafting.

that it will be found an invaluable guide for the judge in his task of discovering what a statute is really intended to mean. I suggest, further, that the history of statutory interpretation, especially since the nineteenth century, indicates plainly the need for such a guide if the rule of law is to be maintained in its historic amplitude.

I cannot put my point better than by quoting the words of one of the most eminent of English jurists, Sir Frederick Pollock. "There is a whole science of interpretation," he writes, "better known to judges and parliamentary draftsmen than to most members of the legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds." Legislation construed by the historic canons of analysis which our Courts adopt is too often so interpreted as to defeat the real intention of the legislator. I have illustrated this from a narrow field; it would be possible to do so from the whole field of the law. I suggest that the method of interpretation should be less analytical and more functional in character; it should seek to discover the effect of the legislative precept in action so as to give full weight to the social value it is intended to secure. The enlargement of the sources of interpretation I have ventured to indicate as desirable would, I think, contribute in an important way to this objective. They would enable statutes to be viewed not in isolation, not as abstract principles separated from the social conditions which provide their real motive-force, but in the framework of the circumstances to which they owe their origin. To view them in this way would, I believe, greatly add to the respect in which the Courts are held. Thereby it would give a new vigour to the creative power of what the rule of law implies.

C. PROBLEMS: CLARITY OF FORM AND EXPRESSION

Problem A:

In the light of the standards of good draftsmanship which are set forth in the foregoing materials, what is your evaluation of the quality of the draftsmanship of the Federal Food, Drug and Cosmetic Act of 1938 (5 F. C. A., Title 21, §§301 to 392)? What suggestions would you have had for improving it, had you been given the job of putting it into final form? Consider the following questions in addition to those you are able to conjure up for yourself:

1. Should the title of the Act have been cast in more specific terms, e. g., as a detailed index of the various parts of the entire law?

2. Would it have been better to incorporate some general

statement of policy in the Act, making clear the objectives sought to be achieved? How would you have suggested that it be incorporated—by preamble, or by a special policy section? Why? Note the policy section in the National Recovery Act (1933), 48 Stat. 195.

3. Would it have been more desirable to place the definition section at the end instead of at the beginning of the Act?

4. Does the "Short Title" serve any useful purposes?

5. Are any of the sections too long? Do they incorporate more than a single idea? What is the advantage of shorter sections aside from the fact that they might be easier to follow?

6. Why not in § 201 (b) (5 F. C. A., Title 21, § 321(b)) enumerate the "Territories not organized with a legislative body," e. g., those other than Hawaii and Alaska, instead of making the reader scurry to other sources to determine just what "Territories" are involved?

7. What is a "component of any article" within the meaning of § 201(g), (5 F. C. A., Title 21, § 321(g)) ? How, if at all, may this be clarified?

8. Sections 201(g) (1) and (2), (5 F. C. A., Title 21, § 321(g) (1) and (2)) are separated by an "and"; §§ 201(h) (1) and (2), (5 F. C. A., Title 21, § 321(h) (1) and (2)) are separated by an "or." Why?

9. Why "or any part thereof" after "the human body" in § 201(i), (5 F. C. A., Title 21, § 321(i)) ?

10. Why use "except that" in § 201(i), (5 F. C. A., Title 21, § 321(i)) and "Provided, That" in § 402(c) and (d), (5 F. C. A., Title 21, § 342(c) and (d)) ?

11. Why a special definition for "immediate container" in § 201(l), (5 F. C. A., Title 21, § 321(l)), when the only place it is used in the Act is in § 201(k), (5 F. C. A., Title 21, § 321(k)) ?

12. Do §§ 201(n) and (o), (5 F. C. A., Title 21, § 321(n) and (o)), properly fit in the chapter on "Definitions"?

13. What is meant by "such drug . . . has become so recognized" in § 201(p) (2), (5 F. C. A., Title 21, § 321(p) (2)) ?

14. Would it have been clearer to have placed the provisions of § 301 (5 F. C. A., Title 21, § 331), towards the end of the Act?

15. What is meant by "and the causing thereof" in the first line of § 301 (5 F. C. A., Title 21, § 331) ?

16. What do "falsely representing, or without proper authority" add to the list of specifically prohibited activities in § 301(i), (5 F. C. A., Title 21, § 331(i)) ?

17. Why not in § 301(k), (5 F. C. A., Title 21, § 331(k)), proscribe simply "any . . . act . . . which results in

such article being misbranded" instead of enumerating "the alteration, mutilation, destruction, obliteration, . . ." etc.

18. Why designate the first type of offense in § 303(a), (5 F. C. A., Title 21, § 333(a)), as a misdemeanor; and why, on the other hand, omit the designation of the more serious offense which carries the three year-\$10,000 penalty?

19. What can be used in lieu of "and/or" in § 401, (5 F. C. A., Title 21, § 341) ?

20. Should § 403(b), (c), etc., (5 F. C. A., Title 21, § 343(b), (c)), have been set out as examples of § 403(a) instead of as subsections of § 403?

21. Why require "by or under authority of this Act" in § 403(f), (5 F. C. A., Title 21, § 343(f)) ?

22. What does § 403(g), (5 F. C. A., Title 21, § 343(g)) Can it be simplified? Why "purports to be or is represented as" when it actually conforms to the definition and standard of identity under § 401, (5 F. C. A., Title 21, § 341) ?

23. Section 402(a) (2), (5 F. C. A., Title 21, § 342(a) (2)), refers to § 406, (5 F. C. A., Title 21, § 346); and § 406 refers back to 402(a) (2) and 402(a) (1). Could all three sections not be combined in the interest of clarity and convenience?

24. Why "hereby directed to promulgate regulations" in § 503(a), (5 F. C. A., Title 21, § 353(a)), and "shall promulgate regulations" in § 504, (5 F. C. A., Title 21, § 354) ?

25. How desirable is the incorporation of other Acts by reference? See, for example, the references to other legislation in § 505(h), § 701(f) (4) and § 801(a), (5 F. C. A., Title 21, §§ 355(k), 371(f) (4), 381(a)).

26. What is the value of § 701(d), (5 F. C. A., Title 21, § 371(d)) ? Could it be dispensed with without any loss?

27. Under § 704 (5 F. C. A., Title 21, § 374), "authorization" is dependent on "permission of the owner," yet in § 301(f), (5 F. C. A., Title 21, § 331(f)), "the refusal to permit entrance or inspection as authorized by § 704" constitutes a misdemeanor. How reconcile these provisions?

28. What does "the right to introduce testimony" in § 801(a), (5 F. C. A., Title 21, § 381(a)) mean? Does it imply a full dress hearing?

29. Of what advantage, if any, is the separability clause in § 901 (5 F. C. A., Title 21, § 391)? On the "separability" problem generally see Stern, Separability and Separability Clauses, 51 Harv. L. Rev. 76 (1937).

30. What does the first proviso in § 902(a) mean? Did this make effective upon enactment all of the Secretary's powers under § 701 (5 F. C. A., Title 21, § 371), or only those powers which are specifically enumerated in the proviso?

Problem B:

The following sections (among others) of the Federal Food, Drug and Cosmetic Act of 1938, (5 F. C. A., Title 21, §§ 334(a), 341, 344(a)), are good examples of how *not* to draft legislation:

Section. 304(a). Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: Provided, however, That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

Section 401. Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: Provided: That no definition and stand-

ard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocados, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Secretary shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the prescribing of any standard of quality for any canned fruit or canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. Any definition and standard of identity prescribed by the Secretary for avocados, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing.

Section 404(a). Whenever the Secretary finds after investigation that the distribution in interstate commerce of any class of food may, by reason of contamination with micro-organisms during the manufacture, processing, or packing thereof in any locality, be injurious to health, and that such injurious nature cannot be adequately determined after such articles have entered interstate commerce, he then, and in such case only, shall promulgate regulations providing for the issuance, to manufacturers, processors, or packers of such class of food in such locality, of permits to which shall be attached such conditions governing the manufacture, processing, or packing of such class of food, for such temporary period of time, as may be necessary to protect the public health; and after the effective date of such regulations, and during such temporary period, no person shall introduce or deliver for introduction into interstate commerce any such food manufactured, processed, or packed by any such manufacturer, processor, or packer unless such manufacturer, processor, or packer holds a permit issued by the Secretary as provided by such regulations.

On the basis of what you have learned from the preceding materials in this Chapter, prepare a redraft of these sections—improving the clarity and arrangement of their language, without impairing any of the substantive content.

Problem C:

The materials in Chapter 2 serve a purpose in addition to that of acquainting the advocate with various tools of argumentation which might be used in persuading courts to resolve ambiguities in legislative language. Some of the cases there are useful as

illustrations of the possible pitfalls which might have been avoided at the drafting stage. Let us see whether they illuminate the pathology of statutory drafting, and whether, by pointing up the bad in drafting, they indirectly help in laying down directional lines for the good. For example, what statutory language if any at all, could have been employed to have made more certain:

(1) That a food which contains a poisonous or deleterious ingredient is not adulterated unless it is established that the ingredient may render such article of food injurious to health. To refresh your memory of the problem, see *U. S. v. Lexington Mill & Elevator Co.*, *supra* at p. 68.

(2) That a shipment of food which was condemned as adulterated in interstate commerce could not be released to the owners for export to another country. See the *Kent Food Co.* case, *supra* at p. 91.

(3) That a drug is misbranded if the misrepresentation as to its effectiveness is caused by false information in booklets or circulars even though they do not simultaneously accompany shipments of the drug in interstate commerce. See the *Rakos*, *Urbeteit* and *Kordel* cases, *supra* at pp. 94, 124, 129.

(4) That the criminal penalties under the Act apply not only to corporations but to employees who stand in a responsible relation to them. See the *Dotterweich* case, *supra*, at p. 135.

Problem D:

Will the following enactment, in your judgment, adequately remedy the difficulties which the government faced in the *Phelps-Dodge* (*supra*, at p. 187) and *Sullivan* (*supra*, at p. 153) controversies? Does it still leave any loopholes for the unscrupulous vendor?

[Pub. L. No. 749, 80th Cong., 2d. Sess. June 24, 1948]

AN ACT

To amend Sections 301 (k) and 304 (a) of the Federal Food, Drug and Cosmetic Act, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (k) of section 301 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U. S. C. 331 (k)), is amended to read as follows:

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

Section 2. Subsection (a) of section 304 of such Act, as

amended (21 U. S. C. 334(a)) is amended by inserting immediately after the words "when introduced into or while in interstate commerce" the following: "or while held for sale (whether or not the first sale) after shipment in interstate commerce."

III

FORMAL DRAFTING REQUIREMENTS: ON THE FEDERAL LEVEL

The draftsman should note the following statutory provisions governing some of the formal requirements for federal law-making:

The enacting clause of all Acts of Congress shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." (U. S. C. (2 F. C. A.) Title 1, § 21.)

The resolving clause of all joint resolutions shall be in the following form: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled." (U. S. C. (2 F. C. A.) Title 1, § 22.)

No enacting or resolving words shall be used in any section of an Act or resolution of Congress except in the first. (U. S. C. (2 F. C. A.) Title 1, § 103.)

Each section shall be numbered, and shall contain, as nearly as may be, a single proposition of enactment. (U. S. C. (2 F. C. A.) Title 1, § 24.)

The style and title of all Acts making appropriations for the support of Government shall be as follows: "An Act making appropriations (here insert the object) for the year ending June 30 (here insert the calendar year)." (U. S. C. (2 F. C. A.) Title 1, § 25.)

No amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restrictions on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; * * * (Rule XVI of the Standing Rules of the Senate as amended by § 103 ch. 753, Public Law 601, 79th Cong., 2d Sess., 1945).

Problem E:

What result if a federal enactment ignores these requirements? Apart from the constitutional limitation upon vague legislation as established by the court in such cases as *United States v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. ed. 516 (1920), are there any federal *constitutional* require-

ments governing the *form* in which federal legislation is to be cast? In *Chase National Bank v. Mobile & O. R. Co.*, 30 Fed. Supp. 565, 568 (1939), the Court suggested that " * * * there are no restrictions in the Constitution limiting Congress to one subject of legislation in each bill, as is found in many state constitutions * * * ." Are there any constitutional restrictions akin to the above statutory requirements?

IV

CONSTITUTIONAL DRAFTING REQUIREMENTS: ON THE STATE LEVEL

In the drafting of state legislation, care should be taken to comply with the various state constitutional requirements governing the formal aspects of law-making.⁹ There, are, for example, state constitutional requirements that no statute shall encompass more than one subject, which shall be expressed in the title;¹⁰ that the enacting clause shall follow a special form;¹¹ that no act may be amended by mere reference to its title alone,¹² etc. Nebraska expresses some of these requirements in Article III of its Constitution as follows:

Section 13- The style of all bills shall be, "Be it enacted by the people of the State of Nebraska," and no law shall be enacted except by bill . . .

Section 14- . . . No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed.

Section 22- . . . Bills making appropriations for the pay of members and officers of the Legislature, and for the salaries of the officers of the Government, shall contain no provision on any other subject.

Section 27- No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two thirds of all the members elected to each House¹³ otherwise direct. * * *

⁹ There are, of course, substantive provisions to observe too, e. g., those dealing with *ex post facto* laws, or with constitutional limitations upon special legislation. These, however, go to the basic question of constitutional power rather than to form.

¹⁰ Md. Const., Art. III, § 29; Ill. Const., Art. IV, § 13; Calif. Const., Art. IV, § 24.

¹¹ Colo. Const., Art. V, § 18; Mich. Const., Art. V, § 20; New York Const., Art. III, § 14; Wis. Const., Art. IV, § 17.

¹² Calif. Const., Art. IV, § 24; Md. Const., Art. III, § 29; Okla. Const., Art. IV, § 57; Utah Const., Art. VI, § 22.

¹³ The words "each House" in section 27 now mean the Nebraska Unicameral Legislature. See the Constitutional Amendment of 1934, Sec. 1, Art. III.

The precise meaning of some of these formal requirements presents little or no problem to the draftsman—for example, that pertaining to the form to be used for the enacting clause. Others, however, provide many difficulties giving rise to controversies over their construction in the courts.¹⁴ Some of these may be exemplified by the following problems:

Problem F:

Under a state constitutional requirement that statutes may not be amended by mere reference to its title, but the act or part of the act to be amended must be reenacted and published at length:

1. What would you, as draftsman, consider to be the “part of the act” which must be “reenacted and published at length”—(1) the subsection of the original act to which the amendment specifically pertains, or (2) the entire section of which the subsection is only one of many parts? Consult *Edrington v. Payne*, 225 Ky. 86, 7 S. W. 2d 827 (1928), and *Martinsville v. Frieze*, 33 Ind. 507 (1870).

2. Is it necessary in the title of an amendatory bill to make reference at all to the title of the original act? Or would it suffice merely to refer, in the title of amendatory bill, to the session law citation of the original act, or to its citation in a revised code or in a compilation?

See Note, 43 Harv. L. Rev. 482; *Ebbert v. Tucker*, 123 W. Va. 385, 15 S. E. 2d 583 (1941); *Lee v. State*, 227 Ala. 2, 150 So. 164 (1933); *State v. Roblin*, 160 Wash. 529, 285 Pac. 745 (1931).

3. Could the constitutional requirement be circumvented by obtaining an amendment by implication? Suppose, for example, that you are called upon to draft a bill which would permit criminal prosecutions for violations of the State Food and Drug Act to be instituted by informations filed by the State Food and Drug Administrator. Assuming that the Code of Criminal Procedure in the State now provides that all criminal informations must be instituted by the county attorney of the county in which the alleged offense took place, would it be advisable to prepare the bill as an independent piece of legislation—without referring at all to the Code of Criminal Procedure—thus amending it merely by implication? See *DeMotte v. DeMotte*, 346 Ill. 421, 4 N. E. (2d) 960 (1936) and *State v. Beddo*, 22 Utah 432, 63 Pac. 96 (1900). See also *Placek v. Edstrom*, 148 Neb. 79, 26 N. W. (2d) 489 (1947). *State ex rel. Kasper v. Lemkuhl*, 127 Neb. 812, 257 N. W. 229 (1934).

4. Would supplemental legislation come within this constitutional requirement? For example, assume that you are

¹⁴ Reference to Merrill, *Legislation: Subject, Title and Amendment*, 13 Neb. L. Bull. 95 (1934) will indicate how numerous these controversies have been in Nebraska.

called upon to draft a bill providing a method for the condemnation and appropriation of privately owned and presently operating utility companies. Would you consider it necessary in your draft to reenact and publish at length an existing statute which provides that the mayor and council may condemn and appropriate real estate upon which the city may establish its own gas works? See *In re Appraisalment of Omaha Gas Plant*, 102 Neb. 782, 169 N. W. 725 (1918); *State ex rel. Jacksonville Gas Co. v. Lewis*, 125 Fla. 816, 170 So. 306 (1936).

5. What of a proposed act which incorporates a provision of earlier legislation merely by reference, e. g., a bill which provides that the present provisions governing the practice in district courts shall be followed in municipal courts? Must the earlier legislation be set forth in the bill—to be reenacted and published at length? See *Department of Banking v. Foe*, 136 Neb. 422, 286 N. W. 264 (1939).

Problem G:

Under a constitutional requirement that there must not be a variance between the title of an act and the subject matter encompassed within the act:

1. When does a variance actually exist? Compare, for example, *Joyce v. Price*, 123 N. J. L. 171, 8 Atl. 2d 226 (1939)—in which the court found a variance between the title, which mentioned tenure of “office,” and the subject matter of the act, which mentioned tenure in “positions” and “employments”—with the situation in *Commonwealth v. Willcox*, 11 Va. 849, 69 S. E. 1027 (1911) in which the court held that even though the bill regulated primary elections and the title referred to “general and special elections,” there was no variance.

2. Suppose that you drafted a bill with the following title: “An act providing a way whereby the county seat of any county within the state may be changed or relocated; and whereby any county in the State may be divided.” Suppose, further, that in committee the provisions relating to the way any county may be divided were stricken from the bill. Should the original title be changed, or would you leave it as it was on the theory that the additional matter in the title would be treated merely as harmless surplusage? See *Murray v. Nelson*, 107 Neb. 52, 185 N. W. 319 (1921).

Problem H:

Under a constitutional requirement that the title must clearly express the subject of the Act:

1. Would it be necessary to include in the title a statement of the means and instrumentalities through which the purpose of the act is to be achieved? Assume, for example, that you are to draft a bill imposing a tax on banks and domestic building and

loan associations with elaborate penalty provisions for non-payment of the tax. Would the following title suffice: "An act to provide for the taxation of banks and domestic building and loan associations"? Consult *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N. W. 551 (1934) and *State ex rel. City of Columbus v. Price*, 127 Neb. 132, 254 N. W. 889 (1934).

2. In an amendatory bill should reference be made in the title to (1) the original act, (2) the original act "as amended," or (3) the last amendment, in those instances where the amendment is of an act which has been previously amended? Compare *Gamon Meter Co. v. Sims*, 114 N. J. L. 590, 178 Atl. 92 (1935) and *Peele v. Ohio & Indiana Oil Co.*, 158 Ind. 374, 63 N. E. 763 (1902).

3. Is the subject of a proposed act—e.g. the exemption of a city from liability for injuries to persons or property arising from the neglect of a street railway company to keep a street in safe condition—expressed with sufficient clarity in the title of a bill which provides "for the organization, government and powers of cities?" See *Weigal v. City of Hastings*, 29 Neb. 379, 45 N. W. 694 (1890).

Problem I:

Under a constitutional provision that no bill may contain more than one subject:

1. May two or more separate statutes be amended by one act, if the subject matter is germane?

See *People ex rel. Central Trust Co. v. Prendergast*, 202 N. Y. 188, 95 N. E. 715 (1911); cf. *State ex rel. Thompson v. Majors*, 85 Neb. 375, 123 N. W. 429 (1909).

2. Are measures enacted under initiative provisions subject to this requirement? Assume that you are drafting proposed legislation covering the general subject of the incorporation and government of municipalities—a proposal to be passed upon by popular initiative. Would you recommend the inclusion within this proposal of a provision prohibiting injunctions against the levy or collection of special municipal assessments? See *Merrill, Legislation: Subject, Title and Amendment*, 13 Neb. L. Bull. 95, 97 (1934).

3. Suppose you were asked to draft legislation which would provide (a) for the payment of specified fees for all county officers, including sheriffs' fees for boarding prisoners, (b) that in any county having a population exceeding 150,000 the sheriff would not be entitled to fees for boarding prisoners, (c) that in such counties: (1) the county board would provide meals, quarters, washing facilities and clothing to the prisoners, (2) all supplies for the furnishing of quarters and other services would be purchased by a person under the direction of the county board, other than the sheriff or his deputies; (3) payment for all such

purchases would be made by the county board on invoices only, and then only if a sworn affidavit of the person designated to make the purchases is attached to each invoice, setting forth under oath that the invoice correctly describes the goods.

Would you put all of these provisions in one bill? If so, why? If not, how many separate bills? Why? See *Endres v. McDonald*, 115 Neb. 827, 215 N. W. 114 (1927), and *Dorrance v. Douglas County*, 149 Neb. 685, 32 N. W. 2d 202 (1948).

4. Would it be feasible to draft a single bill providing for the adoption of a state code even though the sections of the code embraced non-related subjects? See *Central of Georgia Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531 (1898).

To resolve these and other problems governing the formal requirements for law-making under state constitutions, it is necessary that the draftsman consult the cases in his respective jurisdiction—not so much to determine how to persuade the court to adopt a certain construction, but rather to learn what might possibly be done to avoid the judicial controversy in the first place. The more “twilight” or borderline situations are avoided in the observance of these requirements, the better chance there will be to save a legislative measure from the uncertain results of judicial scrutiny. For the “twilight” situation—just like ambiguous legislative language—provides the court with the opportunity to engage in the process of judicial legislation.

V

STATUTORY AND OTHER FORMAL REQUIREMENTS: ON THE STATE LEVEL

In addition to the various state constitutional requirements governing the formal aspects of law making, there are also statutory requirements and common law “rules” which the draftsman should consider in the preparation of legislation in a state, if he is to reduce the opportunities for misconstruing or thwarting legislative purpose. A few of these may be highlighted in the following problems:

Problem J:

1. Assume: (a) that in 1941 a State legislature passed an Act which imposed a tax of \$100 on every paid boxing or wrestling exhibition. (b) that in 1945 an Act was passed which expressly repealed the 1941 Act and provided for a tax on the gross receipts of boxing and wrestling matches. If you were now called upon to draft a bill which would repeal the Act of 1945 in its entirety, what, if anything, would you need to do to make sure that the 1941 Act would not be revived? (Assume that there is no state statute governing the effect of a repeal of a repealing statute.) Compare *Warren v. Suttles*, 190 Ga. 360, 9 S. E. 2d 172

(1940) and *Applestein v. Osborne*, 156 Md. 40, 143 Atl. 666 (1926).

Problem K:

A majority of the jurisdictions in the United States have enacted non-revival statutes which deal expressly with the problem of the repeal of a repealing act. Nebraska, for example, provides that:

Unless such construction would be inconsistent with the manifest intent of the Legislature, * * * No law repealed by subsequent act of the Legislature is revived or affected by the repeal of such repealing act.¹⁵

Would such a statute apply to implied repeals as well as to express repeals? For example, assume (a) that in 1925 a State legislature enacted a measure which gave to the State Board of Control the power to appoint a warden for the state prison, as well as power to "remove the warden for cause, after opportunity is given him to be heard"; (b) that in 1935 another measure was enacted which provided that the warden be appointed by the Governor and hold office during the latter's pleasure; and (c) that the 1935 Act repealed by implication the provision of the 1925 Act relating to the removal of the warden. Suppose that you are called upon to draft a bill which repeals the 1935 Act, and provides for the appointment of the warden by the Board of Control. Would it be advisable to include in the bill an express provision with respect to the removal of the warden to avoid the possible implication that the removal provisions of the 1925 Act might be revived? See *Jackson v. Michigan Corrections Commission*, 313 Mich. 352, 21 N. W. 2d 159 (1946) and *Bender v. United States*, 93 F 2d 814 (C. C. A. 3d, 1937).

Problem L:

Assume that in 1945 a State Legislature passed an amendatory Act requiring employers engaged in hazardous businesses to operate under the provisions of the Workmen's Compensation Act; and that this Act amended a section of the Compensation Act which provided that all employers could elect to come under its coverage. You are now called upon to draft a bill which would retain the general coverage provision of the original Act as it applied to employers in non-hazardous businesses, but provide that employers in hazardous businesses may disregard the requirements of the Compensation Act upon furnishing adequate financial security against common law judgments. Would a repeal of the 1945 amendment, and the amendment of the coverage section of the original Act be a desirable method? If not, what would you recommend? Compare *Sumpter v. Burchett*, 304 Ky.

¹⁵ Neb. Rev. (Supp. 1947) § 49-802.

858, 202 S. W. 2d 735 (1947) and *United States Fidelity & Guaranty Co. v. Steele*, 241 Ky. 840, 45 S. W. 2d 469, (1932) with *State ex rel. Markham v. Elmquist*, 201 Minn. 403, 276 N. W. 735 (1937).

Problem M:

Suppose, in the previous problem, you are called upon to draft a bill which would withdraw from the Workmen's Compensation Act all except employers engaged in hazardous businesses. Would you recommend the repeal of the original coverage section on the theory that this would leave only the 1945 amendment in effect; or would you repeal the original section as amended by the 1945 Act and then re-enact the provisions of the 1945 Act? Or would you do neither? Why? See *Duke v. American Casualty Co.*, 130 Wash. 210, 226 Pac. 501 (1924) and *In re Appraisement of Yakima Amusement Co.*, 192 Wash. 174, 73 Pac. 2d 519 (1937).

Problem N:

Suppose a statute was adjudged unconstitutional because the purview of the statute was at variance with its title. If you were requested to draw up a bill to remedy the defect would you cast it in the form of an amendment to the unconstitutional statute, or would you draw up an entirely new statute? Why? Consult *Smith v. State Board of Medical Examiners*, 172 Ga. 106, 157 S. E. 268 (1931) and *Williams v. Dormany*, 99 Fla. 496, 126 So. 117 (1930).

CHAPTER 4

INFLUENCING AND GUIDING LEGISLATIVE ACTIVITY

A. INTRODUCTORY NOTE

Not the least important of the tasks of the lawyer in the legislative arena is that of influencing and guiding legislative power towards the attainment of specific goals set by those he is called upon to represent. This involves what some may choose to call the "political" role of the lawyer. But whatever the nomenclature, there can now be no serious doubt that he is frequently called upon to play it. Approximately twenty years ago, one of the students of lobbying activities observed that:

The number of lawyers in the capital is truly astonishing. The ratio of attorneys to the rest of the population is higher here than in any other city in the country. * * * There are hundreds who never have occasion to go near a court. They act simply and solely as the spokesmen for the group retaining them. They are very able attorneys and their acts are quite within the legal proprieties. Organized interests have issues at stake and it is only proper that they employ the best counsel to state their side of the case. As the relationship of the lawyer to the organized interest is that of the attorney to his client, it is a matter of considerable difficulty to estimate just how many different groups are represented in the capital. The lawyer does not advertise the fact and will only admit it when questioned directly.¹

Note, for example, the following views on this subject offered at a Congressional investigation by a spokesman for a powerful economic group operating two decades ago in the Congressional arena:²

[Examination of Mr. Walter H. Johnson, by Mr.
Robert E. Healy, Chief Counsel]

"Question. You are also a member of the public policy committee of the National Electric Light Association, are you not?

Answer. Correct.

Question. Which has a general supervision of the policies, the broad policies of that association?

¹ Herring, Group Representation Before Congress (1929), 56-57.

² These excerpts are taken from the Federal Trade Commission's investigation of the activities of public utilities, Sen. Doc. No. 92, 70th Cong., 1st Sess. pt. 3, 312-313 (1928).

Answer. Correct.

Question. When you discuss these legislative matters with the counsel, it is with the expectation, isn't it, that they will oppose these matters in the legislature?

Answer. Correct.

Question. And with the expectation that they will appear before the committees and speak against them?

Answer. Correct.

Question. That they will get friends to do the same thing?

Answer. Correct.

Question. That they will get people at home to urge the members of the legislature that they vote against the bills?

Answer. That will be done, too, by a circular we will send out from the committee. The committee itself will send out two or three times during a session a circular calling their attention to the various bills now before the legislature.

Question. And in that way the result is that the members of the legislature hear from back home quite often?

Answer. Correct.

Question. You don't go up and undertake to buttonhole the legislators?

Answer. No sir.

Question. Your method is to stir up the people back home to write the legislators?

Answer. That is correct.

Question. That is the way you have the pressure exerted on them?

Answer. Yes sir.

Question. And through your counsel you get people to go and speak against the bills?

Answer. Correct.

Question. Are the counsel also expected to talk with legislators outside of committee hearings?

Answer. Why, of course, I don't see why they should not.

Question. Well, I have not said that they should not. I am trying to find out if they do so. Are they paid with that expectation, Mr. Johnson?

Answer. Why they are paid to assist in every way possible.

Question. That is one of the ways of assisting, isn't it?

Answer. Of course, it is.

Question. And if they can get a friend of theirs in the legislature to oppose a measure there, they are expected to do that?

Answer. Of course they are.

Question. These men are not selected just because they are good lawyers?

Answer. They certainly are.

Question. Just for that and nothing else?

Answer. Absolutely.

Question. If one or more of them had a specially wide acquaintance in the legislature, wouldn't that be looked upon as an advantage?

Answer. It certainly would be.

Question. Do you think that it takes special legal skill to do this kind of work that is referred to in the legislature, or don't you undertake to select men that are popular with the legislators, and have a wide acquaintance in the legislature?

Answer. I should say that of course we employ men that have a wide acquaintance, yes, certainly; but they are honorable, and they have got to have good common sense.

Question. I won't say a word against that. But if they have friendships with legislators and acquaintance with legislators, use is expected to be made of that, isn't it?

Answer. Yes; Ralph Baker is one of the most honorable attorneys practicing before the bar. There isn't a man in the whole State known better before the legislature than Ralph Baker, but he is an honorable, upright, and highstanding attorney.

Question. These men, some of them, have been in the employ of this committee or utility companies in connection with legislative matters for years, haven't they?

Answer. Yes.

Question. That experience extends their acquaintance year by year, does it not?

Answer. It does.

Question. And their familiarity with what goes on in legislatures?

Answer. Yes.

Question. And with the committees?

Answer. Correct."

If this was true two decades ago, it is not difficult to imagine the extent of activities of lawyers today in representing group interests before Congress—especially in view of the tremendous increase in the scope of governmental powers. And what is true on the federal level can be no less true on the state and local levels of legislative activity. This development is understandable in view of the fact that our society is made up of functional groups, economic and otherwise, which seek control of governmental power for the realization of desired ends. That functional groups should seek spokesmen to represent them is certainly not surprising; nor is the fact that spokesmen chosen are often lawyers. For, rightly or wrongly, the lawyer has long been regarded as

the specialist in things governmental, as one close to and at home with the instruments of governmental power, as one to be called upon to improvise techniques and plan strategy for easing tension, diverting pressures, and making power felt in the proper places.

As to the propriety of such activities, what more need be said than that the federal and state and local laws which purport to regulate their "bad" aspects, implicitly recognize a zone of activity which is permissible. In the main, legislation relating to lobbying requires the registration and identification of lobbyists, and an airing of how much, for what and for whom, money is being spent. There are the usual restrictions against such obvious crudities as bribery. Within this broad frame-work of control, however, there is general agreement that there is a very large area within which the lobbyist may operate without any fear of wrongdoing under existing laws. There is no doubt, for example, of the propriety of apprising a member of Congress of the content of a proposed piece of legislation. As one witness put it: "I consider it the privilege of a lawyer, and sometimes his high duty, to acquaint a member of Congress, otherwise unacquainted with it, with the subject on which he is expected to cast his vote."³ Nor is there any doubt of the propriety of mapping the strategy for promoting or defeating a piece of legislation—whether it involves corraling the political support of constituents, or advising on the parliamentary strategy for the success or defeat of a legislative proposal. The techniques for the legitimate harnessing of legislative power are as legion as are the skills necessary to master them. The following materials may be helpful—less as a general catalogue of these techniques and skills, than as an introduction to the study of an important but greatly neglected area of the lawyer's education. The excerpts from the T. N. E. C. monograph "Economic Power and Political Pressures" (*infra*), offer a succinct but general account of these techniques and skills; the materials dealing with the "Investigation of Railroad Holding Companies and Affiliated Companies" (*infra*), and Cavers' article on "The Food, Drug and Cosmetic Act of 1938" (*infra*), highlight some of the processes at somewhat closer range.⁴

³ House Hearing, Select Committee on Lobby Activities, 63rd Cong., 1st Sess., 1053 (1913) quoted in Herring *op. cit.* 57.

⁴ Other valuable materials for those who wish to pursue the inquiry more exhaustively are: Smith, Lasswell and Casey, *Propaganda, Communication and Public Opinion* (1946); Chase, *Democracy Under Pressure* (1945); Crawford, *the Pressure Boys* (1942); Zeller, *Pressure Politics in New York* (1937); Hearings before a Special Committee to Investigate Lobbying Activities pursuant to S. Res. 165 and S. Res. 184, 74th Cong., 1st Sess. (1935); and Herring, *Group Representation Before Congress* (1929).

B. BACKGROUND MATERIALS

ECONOMIC POWER AND POLITICAL PRESSURES

T. N. E. C. MONOGRAPH No. 26

76th Cong., 3d Sess., pp. 1, 5-6, 8-9, 57-62 (1941)

CONTROL VERSUS POWER

Governmental power is qualitatively different from control. Power is a political term, synonymous with authority. Control is dynamic and constantly seeks new methods of limiting or using power, * * * ordinarily, in a democracy, power resides in the government, while control is exercised by the various pressure groups.

* * *

METHODS OF CONTROLLING POWER

The methods by which control of power is sought are as varied as the groups which seek it. The role of the general public in the contest may to a large extent be ignored, since the public is generally too formless, too inchoate, to apply pressure at given points for a given purpose, and is largely the passive instrument.

Our purpose is to discover the techniques by which power is directed by conflicting forces toward the attainment of specific goals. . . .

* * * The fight occurs largely in the political arena, but it does not end with the election of Congressmen and Senators. Election is but one phase of the process. The selection of candidates, the drafting of platforms, the party caucus, all function largely in advance of the legislative process. Pressures on Congress while legislating and appropriating, manipulation of law enforcement and administration, and use of the judicial process to achieve individual or group ends, take place during or after the legislative process.

Through the press, public opinion, and pressure groups, it is possible to influence the political process. While all three of these factors have played a part in the process since our beginnings as a nation, the extent and consciousness of their use has grown inordinately. They are employed by all contestants in the struggle for control * * *.

THE SITE OF THE CONFLICT

At what point the brunt of the battle is borne depends on a number of factors, at any particular time. It depends, among other things, on the nature and number of current issues, upon the personnel of the government agencies, Congress, or the Supreme Court, or upon the trend of the dominant public opinion.

The first battle of the conflict occurs in the choice of legislators. The second takes place in the legislature itself. If business [or any other power group (ed.)] loses that, it resorts to administrative agencies charged with the enforcement of the law;

if it loses there, or sometimes while it is fighting there, it has recourse to the courts; and if it loses again, the struggle reverts to the legislature, taking the form of an attempt to amend or repeal the law. The forces of propaganda are, of course, in constant use. Business, for instance, first sought to defeat the National Labor Relations Act in Congress. Failing that, a number of trade journals, the publications of the National Association of Manufacturers and the United States Chamber of Commerce recommended that the act be ignored until it was tested in the courts. (At that time, it seemed likely that a favorable court decision could be secured.) When the act was finally declared constitutional, however, the focus of the attack shifted first to the approaching congressional elections, in the hope of amending the act, and then to Congress itself.⁵

* * *

In seeking governmental sanction for their aims citizen groups focus their attention principally upon Congress. The reason for this is obvious. Congress is the law-making, money raising, and money-appropriating body. In performing these functions it can transform group aims into public policy. With the aid of Congress groups can effect this change through any of four different kinds of action: Legislation, Senate action on treaties and Presidential nominations, and formal proposals to amend the Constitution.

GENERAL LEGISLATION

Much of the general legislation on our statute books is the result, wholly or in part, of group pressures.

The laws passed by Congress are never admitted to be legislation in the interest of special groups. In fact, such bills are taboo as "class legislation."

Bills to prohibit the entry of foreign livestock or meats, while they obviously benefit domestic meat packers, are defended as an attempt to prevent the spread of hoof and mouth disease. Farm legislation, which is admittedly for the immediate benefit to farmers, is argued in terms of the general welfare. Even the soldiers' bonus, which Presidents Coolidge, Hoover, and Roosevelt vetoed as special interest legislation, was finally passed over the veto as a debt which was due the World War veterans. While it was a result of increasing pressure upon Congress, the increased pressure probably resulted from the stringencies of the depression, and many Congressmen undoubtedly defended it in their own minds as an attempt to cope with the Nation's problems of unemployment and destitution.

⁵ Ed. For a more detailed account of the various phases of the battle over the National Labor Relations Act, see Julius and Lillian Cohen, *The National Labor Relations Board in Retrospect*, 1 *Industrial and Labor Relations Review* 648 (1948).

TAX AND APPROPRIATION BILLS

The revenue and appropriation measures passed by Congress afford a particularly good opportunity to fix or change Government policy. Every year Congress passes at least two revenue bills, one for the country as a whole, and one for the District of Columbia; also, it passes a series of appropriations for carrying on Government functions. Finally, at intervals of a number of years, the tariff comes up for consideration.

Like other congressional legislation, such bills may reflect the general welfare (or the aggregate pressure of a large number of groups), or they may result from the pressures of a compact, formidable minority. In any case, they are defended as being in the interest of the general welfare.

The graduated scale of the income-tax law is still being opposed as unjust. The income tax publicity clause, the excess-profits tax, and the undistributed-surplus tax all were finally repealed as a result of business pressure which convinced the public that these measures were inimical to business. Tax matters are technical, the statistics are complicated and easily juggled; hence the electorate is easily confused and pressure groups are particularly successful. The large increase in consumers' taxes during the depression, in spite of the administration's avowed wish to expand consumer purchasing power, is in large part due to this fact.

But these are not the only ways in which tax bills may be used for group purposes. In 1934, for instance, the Farm Bureau Federation, having been unsuccessful in inserting duties on certain imported fats and oils in the previous tariff act, succeeded in securing their inclusion as excise levies in the revenue act of that year.

Taxation is also used openly for policy purposes. The processing tax of the A. A. A., declared unconstitutional in 1936, was levied as part of an effort to raise farm prices.

The tax levied under the Guffey Coal Act [was] levied to secure cooperation with the purposes of the act. The pay roll taxes of the Social Security Act implement[ed] the provisions for the payment of old age pensions and unemployment compensation.

* * *

An instance of counter-attack by pressure groups which goes back a number of years, but is curiously contemporary in its approach, is the reaction of the Institute of American Meat Packers which was under fire in 1916. A House resolution calling for investigation of the meat packing industry in that year was sidetracked by the Institute's efforts. Three years later, by having a resolution introduced in the Senate to investigate the so-called Socialist members of the Federal Trade Commission,

the Institute diverted attention from a Commission report showing monopolistic practices among the big meat packers.

Appropriation bills are likewise subjects of prime interest to organized groups. They provide a constantly recurring battleground for the forces opposing and favoring the various departments and agencies. One way of emasculating an agency whose operations are distasteful or inimical to certain groups is to cut its appropriation to a point where it can not carry on its program. Certain departments or divisions of an agency may be cut out, or a whole agency may be starved out by drastic slashes. The repeated attempts to cut the appropriations for work relief, as well as for the National Youth Administration, the Securities and Exchange Commission, the National Labor Relations Board, the Justice Department's Antitrust Division, and so forth, are examples of this policy-making approach in appropriations.

* * *

POLICY-MAKING THROUGH BLOCKING TREATY RATIFICATION

From time to time the Senate is under pressure to withhold its assent to the ratification of a treaty running contrary to the desires of certain groups. Obviously, such opportunities for compact citizen minorities to put their imprint on policy are few in comparison with those in the field of domestic legislation; nevertheless, they do arise from time to time, and provide another method for group determination of policy.

For example, in 1925, the United States signed at Geneva a treaty outlawing the use of poison gas as a weapon of warfare. Twenty-eight other countries took similar steps, in accordance with the movement sponsored by the League of Nations to limit and reduce armaments. In due course the President forwarded the treaty to the Senate asking for advice and consent to its ratification.

In a speech opposing ratification, Senator Ransdell, of Louisiana, introduced into the Record a letter from the American Chemical Society to Secretary of State Kellogg, asking him to oppose ratification. Mr. Parsons, secretary of the society, also asked Mr. Kellogg to request individual Senators to oppose ratification of the protocol, arguing that ratification would perpetuate the blunder made in Washington in 1922, would lead to unnecessary suffering in future wars, would discourage preparedness against an enemy which might unexpectedly use gas, and would leave the country defenseless. Furthermore, his argument ran, adherence to the treaty would force us to use destructive methods instead of harmless gases in case of war against an unprepared nation, would not be made effective, and would put the chemical industry in each country under the control and supervision of a national board.

This position of the American Chemical Society, first made known in August 1926, was fortified by a statement issued on October 10 by John Thomas Taylor, legislative representative of the American Legion, saying that the Legion, too, was against ratification of the Geneva Protocol. The same stand was taken by the Association of Military Surgeons on October 24 and by the National Association for Chemical Defense on November 14.

In the face of this opposition not even the support of President Coolidge, Secretary Kellogg, and General Pershing, to say nothing of the National Women's Conference on the Cause and Cure of War, was sufficient to gain Senate approval. The Senate voted on December 13 to recommit the treaty to the Foreign Relations Committee..

Even more illuminating is the way various farm groups have tied the Argentine Sanitary Convention up in committee. From 1903 to 1930 the Secretary of Agriculture was authorized to prevent the introduction of communicable diseases of livestock through the medium of fresh meats or other animal products. Under this authority, in 1927, he issued an order prohibiting the importation of fresh meats from any region where rinderpest or foot-and-mouth disease existed. Section 306(a) of the Tariff Act of 1930 prohibited the importation of fresh meat, among other livestock products, from any country if or when either of these diseases exist within its border, leaving no discretionary authority in the Department of Agriculture. The purpose of the Argentine Sanitary Convention, signed in 1935, was to modify that prohibition to the extent of permitting the importation of fresh meats from regions in Argentina that may be determined to be free from foot-and-mouth disease.

For years the opposition of farm and ranch interests [had] been successful in preventing ratification by the Senate. Among the dozens of farm business groups which have urged the Senate to withhold its advice and consent are the American Farm Bureau Federation, the National Grange, the American National Livestock Association, the National Livestock Marketing Association, the United States Livestock Sanitary Association, the National Association of Swine Records, the American Shorthorn Breeders' Association, and the National Wool Growers' Association. Opposition came also from the Texas and Southwestern Cattle Raisers' Association and the Western Slope Stock Growers' Association. Wool, horse, and cattlemen's associations in 13 Western and Southern States forwarded resolutions opposing ratification to Congress. In the three years following the signature of the convention the Congressional Record reveals but one national organization, the National Foreign Trade Council, which had asked the Senate to consent to the convention's ratification. * * *

BLOCKING PRESIDENTIAL NOMINATIONS

Just as Senate refusal to consent to ratification of a treaty can sometimes maintain a favorable position already won, so its refusal to confirm Presidential nominations to administrative posts may be used for certain group purposes. During every congressional session the President sends to the Senate for confirmation the nominations of many persons to public office. Such confirmation is usually given without a great deal of debate, but occasionally a person is nominated whose known views appear invidious to some group, and then pressure will be put on the Senate to withhold confirmation.

The success of organized labor in blocking President Hoover's nomination of Judge John H. Parker to the Supreme Court illustrates this procedure. The first indication of a serious protest against the elevation of Judge Parker occurred on March 26, 1930, when A. F. of L. representatives asked members of the Senate Judiciary Committee to investigate his participation in court decisions upholding "yellow dog" contracts. Three days later the A. F. of L. filed a written objection with the committee and asked for the privilege of appearing in opposition to the confirmation of Judge Parker's appointment. Members of the Senate were called upon to refuse confirmation.

On April 5, A. F. of L. President Green appeared before the committee, voicing the protest of organized labor against the appointment. President Green said he was speaking for 5,500,000 organized workers, and supplemented his testimony by a formal letter of protest addressed to Senators Borah, Norris, and Overman. Notices were sent to the 35,000 unions affiliated with the A. F. of L., urging them to request their respective Senators to vote against confirmation.

Under pressure the Judiciary Committee declined to report the nomination favorably and requested Judge Parker to appear and answer the charges of his critics. In the final vote in the Senate, labor's wishes were followed; the vote against confirmation was 41 to 39.

* * *

President Roosevelt's second term [was] marked by an extraordinary number of fights against confirmation of his nominees. One of the bitterest of these involved the nomination of Senator Black to the Supreme Court. During the debate the Senators' private gallery held numerous lobbyists representing interests on whose toes Senator Black had stepped in his investigations. It was their fight that a number of Senators in the pit below were making. But they lost their fight when the Senate voted 63 to 16 to confirm.

An even greater storm of protest was aroused by the President's nomination of Thomas R. Amlie to the Interstate Com-

merce Commission in 1939. Amlie had been a leading member of the liberal bloc in the House for six years, and had consistently supported New Deal policies. He had been particularly prominent in the fight for increased appropriations for work relief.

As soon as a date was set for the consideration of his nomination by a subcommittee of the Senate Committee on Interstate Commerce, the committee was showered with requests to be heard, both in opposition and support of the nomination. The first witness, Luther D. Walter, trustee in receivership of the Chicago & North Western Railway, appeared "as his own witness, representing no one but himself." He was armed with a detailed account of Amlie's writings for the past 8 years, some of which the nominee himself confessed his inability to secure. Two leaders of the anti-Roosevelt Democratic faction in Wisconsin testified against Amlie. Efforts were made to prove, first, that he was a Roosevelt supporter, and hence, as a Democrat, not entitled to fill a place on the minority side of the Commission; second, that he was a Socialist; and, third, that he was a Communist.

The evidence was conclusive that Amlie was a leader of the Progressive Party; that he had been a member of the Republican Party until the Progressives split off in 1934; and that some of his bitterest denunciations had come from the Communists. It was established that he had supported several plans intended to increase and redistribute national income, raising the living standards of consumers at the bottom of the scale, and that he had advocated Government ownership of the railroads.

Alfred Bingham, son of the late Senator Bingham of Connecticut testified in his behalf, as did John Bauer of the Municipal Ownership League, Mayor LaGuardia of New York, A. F. Whitney of the Brotherhood of Railway Trainmen, and a number of Amlie's colleagues in the House of Representatives.

The hearings were finally closed, after a sizable volume of testimony was taken, and the committee went into executive session. The press was opposed to the nomination almost 100 percent, and printed innumerable editorials in support of their position. The last 135 pages of the 390-page volume of hearings was filled with statements for and against confirmation, a large number of them elicited by the furore in the press.

The Association of American Railroads was bitterly opposed to the nomination, as were transportation groups generally. Several State public service commissions supported Amlie. The lines were drawn with extraordinary clarity between the business groups interested in the railroads, and the liberal faction which Amlie supported during his years in Congress.

The subcommittee delayed for months in reporting its findings, until finally Amlie, convinced that Senate action would not be forthcoming in that session, asked the President to withdraw his nomination.

INVESTIGATION OF [LOBBYING ACTIVITIES OF] RAILROAD HOLDING COMPANIES AND AFFILIATED COMPANIES

Hearings before Subcommittee of the Committee on Interstate Commerce
Pursuant to S. Res. 71, 74th Cong. pt. 3 (1940) pp. 10020-1,
10031, 10074-76, 10079-80, 10085-86, 10087, 10089-91,
10130-32, 10135, 10192, 10193-4

The Chairman. [Senator Burton K. Wheeler] Now, here is another letter [from W. R. Cole, president, Louisville & Nashville Railroad Co.] dated July 26, 1930, addressed to Col. Alfred P. Thom [General Counsel, Association of Railway Executives], which will be made a part of the record.

* * *

The Chairman. I will read from that letter:

Mr. Harrison [Railroad Consultant and former President, National Association of Owners of Railroad and Public Utility Securities] has evolved a plan for completely organizing every Congressional District in the United States with a view of bringing proper influence to bear at home on Congressmen and Senators with respect to legislation calculated to be hostile to the railroads. He seems to have met with a large measure of success in his efforts so far at organization. I expressed the view to him that there could not possibly be any conflict of interest between his Association and the Association of Railway Executives, and that in my opinion the situation demanded the closest sort of cooperation. With this view I understood him to be in thorough accord. I also pointed out to him that on account of the tendency of his predecessor, the late Mr. S. Davies Warfield, to "go it alone," it had been apparently impossible to establish the kind of cooperation between the two organizations which should exist. So far as I know, his Association has been in a quiescent state until recent months. I believe the kind of work he is attempting in organizing the security holders of the country for concerted action to protect railroad investments is an excellent thing if well directed and if the movement proceeds in harmony with the activities of the Association of Railway Executives. Mr. Harrison impressed me as being a reasonable and broad-minded man and I am much more hopeful of cooperative results under his administration than obtained under that of Mr. Warfield. For the reasons mentioned, I feel it is highly desirable to cultivate Mr. Harrison and encourage him in the work he is undertaking. Certainly, it would be a most desirable situation if the owners of the railroads, represented by their millions of stockholders, would take an active interest in protecting their properties against radical legislation of the type constantly being proposed, particularly in the Senate. It would, however, be most unfortunate if in any way the railroads put up a divided front, with the

executives and the owners of railroad securities, through their respective organizations, urging different points of view.

* * *

Mr. Karp. [Assistant Counsel to the Congressional Investigating Committee] But you did suggest at one time to Mr. Fletcher [Vice President and General Counsel, Association of American Railroads] that you could use the Security Owners Association for lobbying purposes, did you not?

Mr. Harrison. No, I doubt it. Of course, I do not know what you mean by "lobbying" in that respect.

The Chairman. Here is a letter from you to Judge Fletcher, dated August 7, 1934, which will be made a part of the record.

* * *

The Chairman. I will read a portion of the letter, as follows:

I am wondering whether the time is not opportune to put before the executives the question of definite organization of railroad stockholders? You will remember we discussed this matter briefly last Friday in connection with the stockholders' circular I showed you—copy of which is enclosed—which we are preparing to send to the owners of two great systems.

One major difficulty with the present situation, it seems to me, is that politicians capitalize on the wide diffusion of railroad ownership. Being scattered among 1,800,000 individuals, who are unorganized, they can be ignored politically. Were they brought together and articulated, I am quite sure there would be a noticeable change in sentiment on the Hill. Nothing impresses those dependent on votes, as you know, more than strong organizations militant in defense of their own interests. Furthermore, legislators in many cases know that they require the support of security owners within their constituencies.

If we concede, as I think we must, the importance of such organization, the next question is: "How can it be brought about?" It seems to me equally obvious that it must be sponsored outside the railroads themselves. And the Security Owners Association would appear to be the logical instrumentality. I am quite aware of the reasons that may be argued against this, most of which lie in the past and are no longer valid, as I believe you will agree, with conditions as they exist today.

First of all, the association has a 17 year record. It therefore escapes that scrutiny given to all new organizations as to what they represent and the forces behind them. It is accepted and well regarded both at the Capitol and by labor—a consideration not to be overlooked. Secondly, it provides a shield almost indispensable in that it can not be so readily accused of narrow self-interest. The right of savings-bank depositors and insurance policyholders to speak in defense of billions in savings invested in the railroads can not be

questioned. And third, and perhaps most important, rivalry between different group interests relative to policy is avoided. A good precedent also exists in the support now being given by the utilities to the American Federation of Utility Investors.

* * *

The Chairman. At the end of 1931 the Association of Railway Executives evolved a plan to create a permanent, well-coordinated lobby machine designed to effectively function throughout the country, did they not?

Mr. Fletcher. [Vice President and General Counsel, Association of American Railroads] I really would not know, Senator Wheeler. I did not come here until 1933.

The Chairman. Well, you became general counsel of the Association of Railway Executives, when?

Mr. Fletcher. On the 1st day of April, 1933.

The Chairman. On July 15, 1934, member roads of the Association of Railway Executives adopted a resolution promulgating a plan to improve the railroad lobbying and propaganda machinery, did they not?

Mr. Fletcher. No, sir.

The Chairman. How is that?

Mr. Fletcher. I think not. You see, Senator Wheeler, that word "lobby" or "lobbying" is a thing I should like to make a little comment on, if I may.

The Chairman. All right.

Mr. Fletcher. If you will look in the dictionary, you will see that a "lobbyist" is sometimes described as a man who is trying to influence legislation. If that is to be taken as the proper definition—

The Chairman. (interposing). I did not mean to refer to it in the way it is sometimes designated.

Mr. Fletcher. The only thing I object to, and it is not based on your question, is the somewhat popular designation of the word "lobbyist" as meaning somebody who hangs around lobbies and pulls people out, and does a lot of things like that, which we do not do. But if it is meant to refer to an effort to cultivate public sentiment on the question of railroads and railroad legislation; yes.

The Chairman. The members of the committee staff have called my attention to a statement which you made on January 16, 1932.

Mr. Fletcher. 1932?

The Chairman. Yes.

Mr. Fletcher. That was before my day here.

The Chairman. This was written by you as chairman of the legislative committee.

Mr. Fletcher. Yes; that is right.

The Chairman. This will be made a part of the record.

The Chairman. It is headed:

Legislative Committee of the Association of Railway Executives, 135 East 11th Place, Chicago.

The letter is addressed to Mr. Dynes, general counsel, Chicago, Milwaukee, St. Paul & Pacific Railroad Co. I read:

You are familiar with the action taken by the Association of Railway Executives at its recent meeting in Atlantic City creating a general legislative committee charged with the duty of assembling and promulgating information relative to legislation affecting railroads, and with the further duty of organizing the States for offense and defense on all matters of legislation, State and Federal, affecting railroads.

Mr. Fletcher. Yes.

The Chairman. That is a mighty good definition of lobbying, is it not.

Mr. Fletcher. If that is your definition, Mr. Chairman, of lobbying, I will go along with you.

The Chairman. I see.

Mr. Fletcher. But let us have that understanding.

The Chairman. I think there are two kinds of lobbyists. I am not one who feels that you can not appear and be heard when legislation is proposed. When bills are introduced in which the railroads are interested, of course, it is perfectly proper, in fact necessary, for the railroads to have somebody to appear before committees and present their views. Obviously, such hearings are in the interest of the general public and of securing full information about the propriety and the wisdom of enacting such bills. There is nothing wrong about that sort of thing.

Mr. Fletcher. Well, I have to go further; I do not know whether you would agree with me or not, but I think the railroad interests, or any other large interests for that matter, can not quite stop there.

The Chairman. I do not mean that they should stop there. There are certain activities, however, on the part of a certain kind of lobbyist which are improper and wrong.

Mr. Fletcher. I think so.

The Chairman. But whenever people present facts openly before committees of Congress, that is a perfectly legitimate form of representation; not only when they openly present matters before legislative committees but likewise when they present them to executive bodies.

Mr. Fletcher. The only thing I would ask you to go further with me on, and it may be you can not go that far with me, is to say that it is perfectly legitimate for any industry to endeavor to get their point of view to the people of the country.

The Chairman. I think that is entirely proper. I think there is no question about that.

Mr. Fletcher. All right.

The Chairman. Provided they do it in an honest way.

Mr. Fletcher. In an open and above-board way.

The Chairman. In an open, honest, and frank way. But it should not be attempted under the subterfuge that it is being done for someone else.

Mr. Fletcher. I agree with you 100 percent on any question of subterfuge.

The Chairman. I think it entirely proper for the railroads to work in their own interests in an open, honest, and above-board manner. But for the railroads to pay out money to people to say they are representing railroad labor, or railroad investors, when as a matter of fact they are not representing either, I think is entirely improper.

* * *

The Chairman. I also call attention to a letter dated February 10, 1932, written by Mr. Jouett, vice president and general counsel of the Louisville & Nashville Railroad Co., to Judge Fletcher, which will be made a part of the record.

The Chairman. I read: * * *

I apologize for my repeated delays in writing you, but I have been away from home almost constantly in attendance upon the Legislature. I ran off last night for a speech on the truck competition at Cincinnati, but am going on at once to Frankfort. This must be my excuse for not having written you in regard to the various matters which you submitted.

I am writing now, however, with reference to your letter of January 27 suggesting the circulation of the two Kentucky bills. I am glad to advise you that they have both come out of the Joint Committee of the House and Senate with favorable recommendations, but there were slight amendments in each bill, the most important being that the gross weight was raised from 13,000 to 18,000 pounds. This is what I really expected would happen when I fixed the original figure at 13,000. These bills were prepared with great care and after a study of some 35 other bills in the country. Three of us lawyers discussed practically every clause, and they were meticulously revised by all three of us, so that I think they are in good form.

We are having a very hard fight, as both bus and truck interests are working like beavers in every section of the State and flooding the Legislature with letters and telegrams from the individuals who are either directly interested in bus or truck enterprises or have been frightened by the solemn declarations of the owners that the busses and most of the trucks will leave Kentucky if the law is enacted. There is also a strong effort to get the farmers to

oppose the bills on account of the contract carriers who are now in the habit of carrying farmers' products to market.

I am busily engaged in writing briefs, pamphlets, and leaflets, as well as in arguing the matter out at all sorts of gatherings. I consider the question one of the most vital that has ever arisen in connection with the business of my client, so am making it my personal fight until the end. I communicated yesterday with every railroad attorney and every station agent and all of the Louisville & Nashville surgeons, requesting that they have letters or telegrams sent from a number of the most influential friends of their respective senators and representatives, and also communications from the principal county officials.

The substitute bill will be printed tomorrow, and it is possible that the Legislature will adjourn tomorrow or next day until Monday.

* * *

The Chairman. I now call attention to a letter on the letter-head of the Western Association of Railway Executives, room 474, Union Station, 517 West Adams Street, Chicago, Ill., dated March 29, 1935, addressed to you, which will be made a part of the record.

* * *

The Chairman. I will read:

I am writing to you to pass on a suggestion which I believe might be of practical assistance to you in handling your legislative matters and which seems to appeal to two or three of the men who were in attendance at the meeting in Omaha yesterday on the United States Chamber of Commerce controversy regarding dimensions of motor vehicles.

As you know, the legislative sessions in a great many of our Western States have now been adjourned and every few days we find that a few more of them have discontinued. In almost every one of these States we have one or two persons in charge of state legislation, a great many of whom are extremely efficient and are persons who are nominally in charge of legislative activities on both state and national matters. Most of these men have given substantially all of their time to the handling of state legislative work and have had their duties so arranged that they have been relieved from the regular routine of office work so that this could be accomplished.

It occurs to me that it would be of genuine value if a few individuals in the respective States could be invited to come down to Washington for two or three days to consult with you and Mr. Ford, to interview in Washington their Senators and Representatives, to get first hand information as to the issues involved, and principally to become energized and enthused with the necessity for strenuous action in their respective States.

In other words, they were going to bring them down here to Washington to give them a public contact?

* * *

The Chairman. I call attention to a letter dated January 5, 1934, written by O. W. Dynes to Mr. H. A. Scandrett, which will be made a part of the record.

* * *

The Chairman. I will read:

At the conference of the Law Committee of the Association of Railway Executives held in Chicago, January 3, 1934, Judge Fletcher stated the bills affecting railroads that have been drawn or that will be prepared and will be presented in the present session of Congress would, if all were passed, cost the railroads of the country \$1,197,000,000.

Judge Fletcher contemplates asking the executives to approve a plan of selecting a number of railroad men who have extensive personal acquaintance with members of this Congress to be assigned to the work of following the progress of the various bills, and more particularly to the work of anticipating action thereon by discussing the bills from the standpoint of railroad interest with members of Congress with whom they are personally acquainted, such conversations to be early enough to get the railroad point of view to the individual Congressmen before they commit themselves to the proponents of the bills. Judge Fletcher's plan contemplates the persons with broad and intimate acquaintance with Congressmen that would be selected for this work would stay in Washington during the several months of the present session or as much thereof as may be desirable. The men to be selected, as I understand it, are to be paid and their expenses are to be paid by the railroad for which they work.

In connection with the foregoing, Judge Fletcher said that members of his staff should not become involved in lobbying with individual members of Congress but should be confined to appearing before committees at their public hearings, and that expenses of lobbying work should not be paid through his office.

He apparently discriminates.

Mr. Fletcher. I do not know who is the author of that.

The Chairman. It was written by O. W. Dynes.

Mr. Fletcher. Oh, yes.

The Chairman. Who is he?

Mr. Fletcher. General counsel of the Milwaukee Railroad.

The Chairman. I continue [reading further] . . .

In pointing out the necessity of the arrangement he is suggesting, Judge Fletcher said that hearings before the committees are largely matters of scenery to satisfy the public and that the effective work can not be accomplished in the appearances of members of his staff before commit-

tees. In his judgment, the effective work in opposition to bills harmful to railroads can only be done through personal interviews with Congressmen conducted by men personally acquainted with the Congressmen they interview, and for whom the interviewed Congressmen would have a feeling of respect and confidence.

* * *

The Chairman. Here is a letter dated May 15, 1934, from you [Mr. Fletcher] to Mr. Dynes, which will be made a part of the record.

* * *

The Chairman. I read as follows:

I know you are aware of the danger which confronts the railroads by reason of the desperate effort which is being made by union labor to pass the six-hour-day bill. This was the subject of my letter of yesterday. (General Counsel's Letter No. 843.) I have quite an active committee working here and I have pulled every string which is accessible. I have some hope now that the bill will be allowed to remain in the Committee on Rules and will not be brought before the House for an actual vote at this session. However, in view of the tremendous importance of the matter we can not afford to take any chances. I am, therefore, asking you to do this for me:

I should like to have your associates in the State of South Dakota go over the situation in their own mind and select a list of men who would be particularly influential with Members of Congress and with Senators and who could come to Washington if the emergency arises. I should like for these men to be made familiar with the provisions of the bill and with our objections thereto so that they can discuss the matter intelligently with the Members of Congress. In my opinion, it would be a mistake to bring to Washington anybody except persons who are quite well acquainted with the Members of Congress and who would not only have influence with such Members but who sustain such relations to them as would make it unlikely that Members of Congress would rise in their places and denounce our friends as lobbyists.

I have no purpose to interfere with sleeping dogs, and I shall, therefore, not send out a Macedonian cry for help unless the situation becomes desperate. However, I would like to have the preliminary work done in the way of selecting men who can come to Washington, if necessary, so that if I wire some time next week or a little later that we are driven to the necessity for canvassing the House and Senate these men would be available for this service.

You have received a copy of the pamphlet which we printed showing the testimony of Messrs. Fort and Parmelee before the Senate Committee. I am having a brief leaflet prepared which will give the substance of this testimony, and I can furnish as many copies of this as are desirable.

Mr. Fletcher. I think that was probably just the type of letter I sent out to a great many people, more than to just Mr. Dynes. We were in desperate straits about that time.

The Chairman. I have here a letter dated September 12, 1934, addressed to Mr. D. E. Riordan, counsel, Wisconsin Railroad Association, 1002 Wells Building, Milwaukee, Wis., which will be made a part of the record.

* * *

The Chairman. I will read it:

I have just received a communication from Mr. Cady advising us as to the organization of the Wisconsin Railroad Association and sending me the minutes of the two meetings, one held August 28 and the other on September 6. From Mr. Cady's letter and from the minutes of the two conferences I learn with the greatest satisfaction that you have been selected as Counsel of the Wisconsin Railroad Association. I am sure that no better selection could have been made, and I am tremendously comforted by the knowledge that the work of looking after public and legislative matters in Wisconsin has been entrusted to your capable hands.

In suggesting the organization of railroad associations in each State I had in mind putting into effect a plan whereby we would be advised as to who are the influential men behind the several Congressmen, and the further thought that we might be able through personal contact or by the careful distribution of literature to influence in a perfectly proper way the judgment of the men upon whom the several Congressmen rely for support and advice. Indeed, I have thought that we might go so far as to get a mailing list which would show the names of the influential citizens of the United States, meaning thereby those who are influential in a political way, so that we might contact those men through our attorneys, employees, and representatives, and in order that we might provide them with such informative publications as are issued by the various railroad agencies, and which discuss the railroad question in a careful and conservative manner. I should be glad, therefore, if you could send me, with reference to each member of Congress and each Senator, dealing with each separately for filing purposes, a statement as to who he is, where he lives, what profession he follows, what is his social and political background, and particularly who are his friends, advisers, and sponsors in each of the counties in his congressional district. * * *

In the same way, however, I should like to know something about the background of the Senators and the persons on whom they probably rely for advice. I appreciate the fact that this is a pretty large order and may require a good deal of inquiry in different parts of the State, but I am seeking to assemble here in Washington a very complete record of each member of Congress, with particular refer-

ence to the influences which control him and the persons upon whom he relies for support. I have long been convinced that we can secure fair treatment from members of Congress only by reaching the people at home. It is a stupendous job to try to contact directly the entire body of citizenry, but it is not impossible, I think, for us to establish contact with influential persons who are real moulders of public opinion.

I shall be very glad to know if what I have outlined in this letter can be accomplished in Wisconsin and whether you feel that you and your organization are in a position to undertake the task.

Mr. Fletcher: Yes; I think that is the letter that was published in Labor some time ago.

The Chairman. I had not seen it. Along the same line I call attention to a letter dated September 6, 1934, addressed to Mr. T. M. Cunningham, general counsel, Central of Georgia Railway Co., which will be made a part of the record.

* * *

The Chairman. I read:

I note the suggestion contained in your letter that the committee in Georgia be continued as it is without employing a manager or a secretary. I should be inclined to go along with that suggestion if I can be assured that I can obtain from Mr. Stanley or someone else all the information and help that I desire in Federal matters. I am trying very hard to build up a file here which will contain the history of every Member of Congress, showing his background, his affiliations, and his influential friends in every county in his District. I should like to know upon whom he relies for advice and counsel and political support in every part of his District. I should like to contemplate that contact shall be made with the influential men upon whom the Congressman relies for advice and support, so that if the vote or influence of a particular Congressman be important we can invoke the assistance of his sponsors in our behalf.

Mr. Fletcher. That was typical of a good many of the letters I wrote.

The Chairman. On October 31, 1934, you directed chairmen of the State legislative committees and State railroad associations to assign a particular Congressman to one of the members of the State committee or association. Here is a letter of that date addressed "To Chairmen of State Legislative Committees and State Railroad Associations" which will be made a part of the record.

* * *

The Chairman. I call attention to page 2 of that letter, the third paragraph, reading as follows:

I think it would be well for the person who is charged

with primary responsibility in each State to assign a particular Congressman to some member of the organization or of the committee, with the request that the person to whom a particular Congressman is assigned endeavor to have him interviewed at home by as many of his influential constituents as can be persuaded to undertake the task. It would be very helpful, indeed, if a hundred influential citizens in each district could mention the matter to the Congressman and give him to understand that the measures advocated by the railroads meet with the approval of his constituents and that those measures which the railroads disfavor are not looked upon with approval by the influential men among the Congressman's constituents. It certainly would be very helpful if approximately 35,000 influential citizens in the United States could speak to the members of Congress between now and January 1, giving them to understand that the people are interested in the welfare of the railroads, that they realize they must be sustained under private ownership, and that members of Congress will incur the disfavor of their constituents if they do not legislate in such a way as to insure fair treatment to the railroads.

Whom in Montana did you assign to me?

Mr. Fletcher. I do not remember, Senator Wheeler. I think nobody.

* * *

The Chairman. The Association also endeavored to influence appointments to congressional committees handling bills in which the railroads were interested?

Mr. Pelley. [President, Association of American Railroads] How is that Sir?

The Chairman. I say, the Association also endeavored to influence appointments to congressional committees handling bills in which the railroads were interested?

Mr. Pelley. Oh, I do not know of anything we did in that direction.

The Chairman. Did not the Association endeavor to influence appointments to the Rivers and Harbors Committee of the House of Representatives?

Mr. Pelley. Not to my knowledge.

The Chairman. You say not to your knowledge?

Mr. Pelley. No, sir. I do not know anything about that. Have you got anything there that indicates I did?

The Chairman. Mr. Fletcher, you knew something about it, did you not?

Mr. Fletcher. I do not recall a thing about the Rivers and Harbors Committee, Senator Wheeler; not at this moment, at least.

The Chairman. I call attention to a letter written by B. E. Dwinell and addressed to you. Who is he?

Mr. Fletcher. That is Bruce Dwinell. He is general attorney of the Rock Island Railroad. I know him very well.

The Chairman. He writes you under date of January 6, 1933, and this letter will be made a part of the record.

The Chairman. He says:

One of the matters which I wish to handle at Washington this term of Congress—

Mr. Fletcher (interposing). Pardon me, Senator Wheeler, but I want to say that was before Mr. Pelley came into this picture.

The Chairman. Yes. I find now that is true. [Reading]:

One of the matters which I wish to handle at Washington this term of Congress is the matter of securing sympathetic representation in the Rivers and Harbors Committee of the House. There will be at least six, and perhaps eight, vacancies among the Democratic membership of this committee next session. So far as we know, there will be no Republican vacancies. A number of the Republican representatives have been defeated and will not be members of the next Congress, but on account of the increases in the Democratic membership of the House the Republican representation on the Committee will be decreased. The work of securing suitable representation on this committee is rendered difficult by three facts:

(1) There is no use in trying to get sympathetic representation from districts which are directly interested in the development of some particular stream or harbor.

(2) There is no use to try to get on this committee new Representatives from States which are already represented on the committee.

(3) Men whom we would like to have on this committee, but who are serving on such important committees as Appropriations, Ways and Means, or who are serving on two good committees already, would not wish to resign from these committees and become junior members on the Rivers and Harbors Committee.

A combination of these reasons eliminates, for instance, Texas, New York, Louisiana, Oregon, Ohio, Indiana, Missouri, Kentucky, Pennsylvania, New Jersey, California, and a number of other States.

Inland communities are not represented on this committee. They should have representation in order to protect their districts against the transportation isolation which will result from the increased development of inland waterways and these are the sections of the country which we should attempt to have secure representation.

Below I shall suggest some possible names for representation. I would like to ask you to secure from the State legislative committees reports on these men; that is, reports as to whether they would be unfriendly to the waterways. As soon as we have the reports on these men we can then

take the next step and ascertain whether they would be willing to serve on this committee. Then we can go a step further and try to get them on the committee.

There are two representatives from Colorado, Lewis from the First District and Martin from the Third. There is one representative from an inland community in Iowa, Mr. Eicher. A woman by the name of Miss O'Laughlan has been elected from a western district in Kansas. A new representative has been elected from Nevada by the name of Scrugham. A new representative has been elected from western Oklahoma by the name of Marland, formerly president of the Marland Oil Company. One of the representatives from eastern Tennessee is Mr. McReynolds. Utah has two Democratic representatives—Mr. Murdock and Mr. Robinson.

Mr. Craig has stated that he will look after Illinois.

Who is Mr. Craig?

Mr. Fletcher. He is general counsel of the Illinois Central Railroad.

* * *

The Chairman. Here is a letter dated January 7, 1933, addressed to Mr. R. B. Porter, general attorney, Union Pacific System, Salt Lake City, Utah, which will be made a part of the record.

The Chairman. I will read it.

We are making a very serious effort to get some friends on the next Rivers and Harbors Committee of the House. A great deal of important legislation will be referred to that committee dealing with waterways and particularly the operation of the Federal Barge Line.

Our special representative, Mr. Dwinell, has suggested that we should endeavor to get some representation from States which are not committed to waterway programs. One of these is Utah. He is inquiring if I can ascertain whether Congressmen Murdock and Robinson would be suitable members of the committee from the railroad point of view. The question is whether these gentlemen would probably oppose the reckless expenditure of public funds for the extension of the waterways.

Will you kindly make some quiet inquiry among the members of your committee if you do not already have the information, and advise your views as to what information you can obtain with reference to Messrs. Murdock and Robinson.

And that, it seems, was signed by "R.V.F."

Mr. Fletcher. That is apparently my letter. I was following up the suggestion made by Mr. Dwinell.

* * *

The Chairman. Do you recall that you had the New Jersey

Chamber of Commerce champion a bill with reference to busses and trucks?

Mr. Fletcher. I do not recall that specific incident, but I am not surprised about it. I know there was a great deal of legislation in the States dealing with busses and trucks.

The Chairman. This was legislation introduced in the House of Representatives.

Mr. Fletcher. In New Jersey?

The Chairman. No.

Mr. Fletcher. In the House of Representatives over on the other side, here in Washington?

The Chairman. Yes. It was drafted by your organization but championed by the New Jersey Chamber of Commerce.

Mr. Fletcher. Has that reference to the general bill which was ultimately passed, not in the form originally drawn, but the Motor Carrier Act of 1935? That bill, as is well known—

The Chairman (interposing). The bill as passed was drafted by Mr. Eastman, was it not?

Mr. Fletcher. Might I take your time to make a little explanation about that.

The Chairman. Yes.

Mr. Fletcher. Originally there was a committee, which consisted of motor truck operators, railroad men, and representatives of State railroad commissions—I mean those three groups were represented in the committee that drew the bill. That bill was turned over to Mr. Eastman for his consideration, and he drafted a bill, which, after some amendment, finally became the Motor Carrier Act of 1935. Embodied therein were a good many of the suggestions made by this joint committee.

The Chairman. The original bill introduced in the House was quite a different bill from that which was drafted by Mr. Eastman or the Interstate Commerce Commission, was it not?

Mr. Fletcher. Well, that original bill, as drafted by this joint committee of which I speak, and on which the motor-truck people were represented, might have been introduced in the House. I suspect it was. But I do not think it got far. But we stated to the committee the agencies interested in and the history of that bill. I know I did that myself when I appeared before the House committee. Now, I think the activity of the New Jersey Chamber of Commerce, at least if my memory is not at fault, consisted in supporting a bill of that type and character, just as we asked many other commercial bodies to do.

* * *

Mr. Brown. [Executive assistant to Congressional Investigating Committee]. Mr. Chairman, I have a letter from Mr. Littlefield to Dr. Duncan, dated February 7, 1935, which I offer.

Senator Truman. It will be received.

* * *

Mr. Pelley. Well, Mr. Brown, what do you want to know?

Mr. Brown. Whether you at the time approved of this:

To keep the railroads in the background as much as possible, the New Jersey study has been sponsored by the New Jersey Taxpayers Association. This is not a railroad employee association.

Mr. Pelley. If that had been brought to my attention I am quite sure I would have agreed with Mr. Littlefield's policy of handling it.

Mr. Brown. And you still approve of it?

Mr. Pelley. Yes. I think it is all right.

Mr. Brown. You say you think it is all right?

Mr. Pelley. Yes.

Mr. Brown. For the Association to muster a large campaign and stay in the background by having some non-railroad organization go out in front?

Mr. Pelley. Well, I think it is perfectly proper for us to protect our interests in any legitimate way we can, and this is certainly a legitimate way of doing it. I do not see anything wrong with that.

Mr. Brown. Well, that is your point of view.

Mr. Pelley. Certainly. Do you? Just what is wrong with it?

Senator Truman (interposing). I think it would be much better for the railroads and the public for them to transact their business in the open.

Mr. Pelley. We do transact our business that way, very much in the open, but we do it in the most effective way that we think appropriate and proper. And the most effective way I think was to try to interest others who had a common interest.

* * *

DAVID E. CAVERS, THE FOOD, DRUG, AND COSMETIC ACT OF 1938: ITS LEGISLATIVE HISTORY AND ITS SUBSTANTIVE PROVISIONS⁶

6 Law and Contemporary Problems, 2-22 (1939)⁷

The struggle for the enactment of the Food, Drug, and Cosmetic Act of 1938 may aptly be termed a campaign of attrition. Five years and one day elapsed between the date in 1933 on which Senator Royal S. Copeland of New York introduced what soon was to be christened the "Tugwell Bill" and the date in 1938 on which the final legislative step was taken for the enactment of its lineal descendant. Throughout those five years, there was seldom reason to doubt that some new law would be passed. What the handful of proponents of the measure, in Congress and out, fought for so persistently was to prevent the passage of a law stripped of those provisions which they regarded as essential to consumer protection.

* * *

⁶ Reprinted with the permission of the Duke University Press.

⁷ The selected footnotes have been renumbered.

I

Perhaps the most striking characteristic of the history of the Food, Drug, and Cosmetic Act is the fact that this measure, which was of consequence to the health and pocketbook of every citizen of the country and which importantly affected industries whose annual product totals roughly ten billion dollars, never became the object of widespread public attention, much less of informed public interest. The affected industries were kept posted by their associations and their journals. Some national women's organizations sought to apprise their membership of major developments; but the public at large, including persons ordinarily well-informed on national affairs, knew little or nothing of what was transpiring in Congress. I suspect that today only a small fraction of the public knows that a new law has been enacted.

For the existence of this situation, the nation's press must stand primarily accountable. In the long history of the bill, The New York Times seems to have seen fit to give it front-page mention on but a single occasion and then only to report a disturbance in the Senate galleries. The Times' policy was not exceptional. Magazines of large circulation were silent or unfriendly, an attitude contrasting sharply with their militant advocacy of the Act of 1906. That this policy was due in no small degree to the fact that the measure was widely represented as menacing to advertising revenues seems inescapable. However, some share of responsibility must be attributed to President Roosevelt's disinclination to give the measure a prominent place on his program.* Had the bill been accorded, at any stage in its progress, a major fraction of the support granted any one of a dozen New Deal laws, no news boycott could have been maintained against it.

Yet under no circumstances would the legislative task have been an easy one * * * [for] the consumer interest is "difficult to organize for its own protection."* Moreover, opposition to the food and drug bill was potentially more formidable than that which could be mustered against most New Deal legislation. Not only are the affected industries huge in size but they are decentralized. Although there are some corporate giants in each of

* President Roosevelt approved the initiation of the movement for new legislation, sent one message to Congress on its behalf, * * *, and from time to time manifested to Congressional leaders his desire to see a satisfactory law enacted. Why he did not press more vigorously for the measure is an interesting field for speculation. Obviously he regarded other legislation as more important and evidently thought its chances of enactment jeopardized by giving equal standing to a bill against which such bitter hostility had been aroused. Moreover, the bill could not easily be classified as a "recovery" measure nor were the practices against which it was directed peculiarly the product of the pre-depression period.

* Nelson, Representation of the Consumer Interest in Federal Government, [6 Law and Contemporary Problems 151 (1939)].

the three producing industries, typically the industries are composed of units of moderate and small size, so well distributed throughout the country that each Representative has at least some affected interest in his district. Moreover, wholesale and retail distributing outlets are legion and, in the case of the drug trade especially, are, on this issue, closely linked to the manufacturers.¹⁰ Again, the incidence of a food and drug law falls upon important agricultural as well as manufacturing interests. Finally, the measure was of consequence to all newspaper publishers, large and small, and to most publishers of other types of periodicals. There was no opportunity therefore to secure support from regions of the country which would not feel the effects of regulation, nor to align rural against urban interests, or *vice versa*.

Within the industries themselves there was some division of interest, but the benefits to be derived from stricter regulation by those branches of the industries most likely to profit by the enforcement of higher standards were not so consequential as to outweigh their fears of burdens which additional regulation of the sort proposed might impose. A considerably milder measure would doubtless have received support from important segments of the trade.

What withheld the opposition from exerting to the full the power that was theirs was chiefly, in my opinion, the fear that the victory would be a Pyrrhic one. The success of most of the units in the industries rests not so much on merits peculiar to their particular products but on consumer good will assiduously cultivated for those products by years of costly advertising. Good will is a sensitive plant. A legislative victory might leave the consumer convinced that the industries could not afford to permit further regulation. Moreover, no such victory could be a decisive one. Inevitably there would be another campaign, and every such campaign would levy its tolls, both by creating business uncertainty and by alienating a still greater number of consumers.

The tactic of the opposition was therefore clear. Some bill would have to be enacted, and the problem was to restrict the measure narrowly enough to avoid the risk of embarrassing changes in merchandising and industrial practices while at the same time establishing in the public mind the belief that an acceptable law had been adopted. Judgment as to the provisions of a law which would meet these specifications varied with the type of product and with the standards of the producer. Espe-

¹⁰ The Drug Institute of America was represented by counsel at two hearings on the bill. It was an association of "40,000 members, approximately 37,000 being retail druggists; the balance being manufacturers and wholesale druggists." Testimony of H. M. Bingham, Hearings before the Senate Committee on Commerce on S. 2800, 73d Cong., 2d Sess. (1934) 216 * * *.

cially was this true of the provisions defining adulteration and misbranding. The maker of antiseptics had apprehensions which differed from those which disquieted the producer of pain-killers; the Florida orange grower's worries had only a common concern in coal-tar coloring to link them to those of the hair-dye manufacturer. Trade association activities and that form of cooperative effort known as log-rolling brought some degree of coherence to the ranks of the opposition with respect to the substantive provisions of the various bills, but it was far easier to achieve a united front on the procedural, administrative and, to a lesser extent, advertising provisions, the incident of which was much more general.

In view of the foregoing, it is not surprising that the legislative history of the Food, Drug, and Cosmetic Act is a record chiefly of committee action. The bills seldom emerged on the floor of either house and then only for brief periods. The forum was not the Capitol but the House and Senate Office Buildings.

II

To Rexford G. Tugwell, then Assistant Secretary of Agriculture, must be given credit for initiating the movement for revision of the Act of 1906. * * * Criticism of the Act, emanating both from the Food and Drug Administration (hereinafter termed the "F & DA") and from students of the field, had been ignored by successive national administrations. The public was unaware of the limited character of the protection accorded them. It was not until the success in 1927 of "Your Money's Worth" by Stuart Chase and Fred Schlink, the creation of Consumers Research under the latter shortly thereafter, and especially publication of the best-selling "100,000,000 Guinea Pigs" by Kallet and Schlink in 1933 that an appreciation of the deficiencies of the existing law and the advantages taken of them by elements in the industries became at all general.

Mr. Tugwell was acquainted not only with these works but with their authors. When he came into the Department of Agriculture, he sounded out the Chief of the F. & D. A., Walter G. Campbell, as to the adequacy of the existing law, and obtained confirmation of weaknesses alleged by its critics. His next step was to secure Presidential sanction for the revision of the Act. This was granted, and he then undertook to organize a group to draft a measure designed to correct the defects in the existing law.

This group was comprised principally of officials of the F. & D. A. and members of the staff of the Solicitor's Office of the Department of Agriculture, but to assure the presentation of other points of view and to aid in technical problems in drafting, there were added Milton Handler of the Columbia University Law School faculty, Frederick P. Lee, formerly legislative counsel to the Senate, and the writer of this article.

This group began its work late in March, 1933, and continued until shortly before the close of the hundred days' special session. Mr. Tugwell took no part in the actual drafting process; he was apprised of its progress and consulted on major problems of policy, but his role was distinctly that of sponsor rather than author of the measure which later was tagged with his name.

The committee was charged with the task of revising the existing law within the administrative framework created for that law, not to revise that framework, even though it were thought insufficient to provide complete protection for the consumer. The F & D A has been, by and large, a policing organization, acting after the event to detect violations of the law. The prosecution of violations in the federal courts is vested in the Department of Justice. The establishment of, for example, a system of licensing controls, vested in an administration with broad quasi-judicial and quasi-legislative powers, would, if feasible, greatly augment consumer protection. Yet the legislative experience of the bill as drawn clearly demonstrates that a more ambitious undertaking would not have been politically practicable. Moreover, it is questionable that the administrative and scientific problems inherent in any comprehensive licensing system in this field are as yet susceptible of solution.

Early in the drafting process it became evident that the inclusion of the provisions for which experience in the enforcement of the old Act had demonstrated the need could not possibly be effected merely by amendments to that act. The drafting of a new act was essential. The source of suggestions what that act should contain was primarily the F. & D. A. and not its advisers, although each made some contributions.¹¹

Need was felt in the course of the drafting work to obtain the views of representatives of the affected industries,¹² but the manner of eliciting their advice presented a difficult problem. Each of these industries is comprised of many branches whose interests and views on questions of legislative policy are far from identical. Consultation with representatives of each of these branches was simply not feasible if a bill were to be introduced before the close of the special session, an objective thought important, though enactment at that session was not expected. Moreover, the drafting group was compelled by reason of the intricacy of its task to proceed slowly. Submission to the industries of proposals in piecemeal form would have prevented their adequate appraisal. In this dilemma, it was decided that the best procedure would be to call meetings of representatives of the affected trades and, instead of submitting partial drafts to

¹¹ The notion was later disseminated widely that the bill was the product of inexperienced pedagogues. On occasion it was intimated that they were in receipt of suggestions from the Comintern.

¹² Questionnaires were sent to state food and drug officials and to interested private organizations and individuals to secure their suggestions.

them, merely to seek the expression of their opinions whether and how the Act might be properly revised.

In accordance with this plan a conference with drug trade representatives was held on April 27, 1933, and one with food trade representatives the day following. These conferences, while making clear the prevalence of opinion that the Act was in need of revision and proving productive of some suggestions of value, on the whole were unsatisfactory. Considerable disappointment was manifested by those present that no provisions were submitted for consideration. Viewed in retrospect it seems probable that the progress of the legislation would have been facilitated if no attempt had been made to introduce a bill in the special session and, instead, the draft had been made available upon its completion to industrial and consumer groups to obtain their reactions and suggestions. Some of the revisions which were later forced by industry opposition could have been made before the beginning of the regular session in January, 1934. The course followed served to arouse suspicion and hostility which thereafter could never be completely allayed. Opposition there inevitably would have been, but it is doubtful that, if the other procedure had been followed, this opposition would have gained the impetus that it did.

CONSIDERATION BY THE 73D CONGRESS, 1933-1934

The completed draft was first submitted to the chairmen of the Committees on Agriculture in both House and Senate. When they declared their inability to consider it, the draft was submitted to Senator Copeland of New York, a member, and later chairman, of the Commerce Committee of the Senate, who had previously manifested interest in some matters affecting the F. & D. A. Senator Copeland was not only a physician but had once been the Health Commissioner of New York City. He introduced the measure without change and, as he later confessed, without having completely read it. The special session however was rapidly drawing to a close. The bill, bearing the number S. 1944, was referred to the Committee on Commerce and a subcommittee consisting of Senator Copeland, chairman, and Senators McNary and Caraway, was appointed to consider it.

S. 1944 received a far from cordial welcome from the industries. However, the attention of the food industries for a time was distracted from it by the activities of the NRA and AAA which were rapidly accelerating during the summer and fall of '33. The drug industry, upon which the impact of the measure was much more severe, was promptly informed of its iniquity. A swelling tide of protest rose in the periodicals and meetings of the trade. The public, however, had little opportunity to learn of the existence of the measure. The most militant consumer organization, Consumers Research, damned it with faint praise and many criticisms. The principal source of consumer information was the F. & D. A.'s "Chamber of Horrors."

The F. & D. A. was forbidden by a law¹³ applying to governmental agencies generally to spend public funds to influence members of Congress with respect to pending legislation, but the Administration did succeed in making vivid the need for a new law by the device of assembling exhibits illustrative of the operation of the existing Act, a step within its legal powers. The "Chamber of Horrors," to use the name conferred by a columnist who visited it, was an array of pictures, labels, and advertisements of ineffective or harmful and occasionally lethal nostrums, dangerous cosmetic preparations, and adulterated or deceptively packaged and labeled foodstuffs which the F. & D. A., under its existing powers, either could not reach or was greatly handicapped in reaching. The exhibit gradually achieved a considerable measure of public notice, thanks in no small degree to the diatribes which it evoked from the industries whose skeletons were thus uncloseted.

By December 7 and 8, 1933, when hearings on S. 1944 were scheduled, trade opposition had been well mobilized. Some consumer support had been hurriedly marshalled, chiefly among women's organizations, but the great majority of those testifying at the hearings were representatives of industry. Very frequently attacks on the bill were prefaced by admissions that the existing law was in need of amendment. The burden of the complaint was that a few amendments alone would have sufficed, and that so general a revision as had been undertaken was not only unnecessary but would destroy the benefit of the accumulated decisions interpreting the old law and thus compel the courts to start afresh. Few sections escaped criticism. It was notable however that the criticisms frequently were directed to the phrasing of sections rather than to their substance. An outstanding example of this was the language of the sections defining false and misleading labeling and advertisements: "An advertisement [or labeling] * * * shall be deemed to be false if in any particular it is untrue or by ambiguity or inference creates a misleading impression. * * *"¹⁴ The fact that this provision represents a close paraphrase of language used by the Supreme Court in one of those decisions which the opponents of S. 1944 were so anxious to preserve seemed in no way to assuage the pain which this provision caused.

Branded as especially sinister were the rule-making powers granted to the Secretary of Agriculture with respect to certain problems on which a broad prohibition, not supplemented by regulations, would either have been ineffective or, by uncertain or unequal application, have worked injustice. Although the opposition persistently stressed the dangers of uncertainty, these

¹³ Third Deficiency Appropriation Act of 1919, 41 Stat. 35.

¹⁴ S. 1944, § 9(a). The same language was used in the definition of misbranding. *Id.* § 6(a).

seemed inconsequential before the peril that the Secretary would become "Czar" of the industries.

One complaint specific to the drug industry was the charge that the bill represented a calculated attempt to deprive the American people of their right to "self-medication," a charge thereafter to be constantly reiterated with illustrations which were notable examples of hyperbole.¹⁵ The principal concern of the food industry was aroused by a provision authorizing the Secretary to promulgate grades of quality for food products. However, the chief spokesman in opposition to this proposal came from the ranks not of the food industry but of the publishers who saw in the establishment of such quality grades a menace to the benefits derived by the American housewife from the advertising of branded goods.¹⁶

Spokesmen for the consumer and public health agencies were generally favorable to the bill. However, no appearance was made on behalf of the American Medical Association, its representative merely filing a brief complaining of the rule-making powers conferred on the Secretary. The representative of Consumers Research prefaced an attack on the bill for its inadequacy by insisting that Senator Copeland was disqualified to sit as chairman and should be removed.

This charge, repeated at a subsequent hearing and given considerable publicity, requires consideration here. It was based on the fact that Senator Copeland was giving brief health talks on radio programs advertising Fleishman's Yeast, a product which Mr. [Arthur] Kallet [representing Consumers Research] declared would be adversely affected by the advertising provisions of the pending bill. On the question of principle raised by this conflict of interest opinion will differ, but that Senator Copeland sought to sabotage the measure which he sponsored neither I nor those with whom I was associated in work on the bill believe. Had he desired to "sell out" the public, this end could easily have been achieved. Instead, he worked assiduously to obtain as good a law as he believed he could possibly secure. There is no doubt but that this effort shortened his life. He died of a condition rendered acute by overwork just four days after the enactment of the law.

Perhaps a more successful protagonist for the measure could have been found. Throughout his legislative career, Senator

¹⁵ An all-too-typical example follows: "It would be a real hardship if you or I could not take an aspirin tablet or mineral oil or bicarbonate of soda without a physician's prescription. No, the bill does not say that, but such things, are possible under its provisions." Calkins, Another Look at the Pure Food Bill (Dec. 1933) 97 Good Housekeeping 90.

¹⁶ See Testimony of C. C. Parlin on behalf of the National Periodical Publishers, Hearings before a Subcommittee of the Senate Committee on Commerce on S. 1944, 73d Cong., 2d Sess. (1933) 318. (Hereinafter cited as "Hearings on S. 1944.")

Copeland had sought chiefly to conciliate rather than to override opposition, a technique which, of course, compels compromise. Moreover, he did not enjoy the political favor of President Roosevelt. But it is by no means certain to me that these factors were wholly detrimental. Unless the Administration had been willing to give the measure a place on its early "must" lists, an intransigent attitude might have led to the final defeat of the bill or the enactment of one of the many inadequate substitutes which were introduced. Senator Copeland's known conservatism served to offset in some degree the antipathy displayed in Congress to Mr. Tugwell, an antipathy cultivated by the opposition as one of its principal assets.

At the conclusion of the hearings on S. 1944 it was obvious to those who had shared in its drafting that some revision would be necessary. Certain amendments were called for because of deficiencies in the bill which had become evident either before or at the hearings. Other amendments seemed desirable because thereby criticisms could be met without requiring substantial sacrifices in objectives. Still others, though regretted, seemed inescapable if the opposition to the bill were to be reduced to a point where it could be overcome. Already it was clear that competing bills drafted by industry counsel would be introduced and there was a real risk that one of these, which were far from satisfactory, would be enacted unless the opposition to S. 1944 could be divided. Accordingly the group which had drafted the original measure (with the exception of Mr. Handler and Mr. Lee who had been appointed to other governmental posts) undertook to revise S. 1944. The revision thus effected was approved by Senator Copeland with some changes and introduced by him as S. 2000 at the second session of the 73d Congress on January 4, 1934.

S. 2000 compelled some change in position on the part of spokesmen for the industries,¹⁷ but it is doubtful whether the hostility rampant in the rank and file as a consequence of the propaganda against the "Tugwell Bill" was materially lessened. On the other hand the modifications it introduced brought forth sweeping condemnations from consumer spokesmen of the Consumers Research group. Dubious of the efficacy of S. 1944, they were ready to place the worst construction upon all relaxa-

¹⁷ In particular the complaint of dictatorial power in the Secretary was diminished by the provision for a Committee on Public Health and a Committee on Food Standards. These committees were charged with the duty of recommending regulations to the Secretary within their respective fields, and no regulation could be promulgated by him without their approval. S. 2000, § 22. This provision was greeted by a coolness which contrasted sharply with the warmth engendered by the menace of dictatorship, and it disappeared at the end of 1936, after having served at least to work an estoppel on some critics of the bill. The arguments for and against these committees from the consumer's standpoint seem to me to be evenly balanced.

tions in its provisions. Judgment of the effect of the changes was expressed by the term "emasculated." This notion was circulated most widely among liberal groups whose aid might reasonably have been anticipated. The result was that they promptly developed a defeatist attitude toward the bill, and such support as they might have rendered in preventing the far more damaging changes which were still to come was largely withheld. The representatives of the women's organizations had a more realistic understanding of the possibilities for legislation in this field and, while disappointed by a number of changes which were made, increased rather than diminished their efforts to secure the best possible bill.

In the months that followed Senator Copeland was subjected to constant pressure from a great variety of special interests, each of which enjoyed influential Congressional support. Still hoping to conciliate this opposition or at least to prevent a shift in Congress to the support of the competing McCarran-Jenckes Bill,¹⁸ Senator Copeland consented to a number of the amendments proffered. Ultimately changes in S. 2000 became so numerous that he decided to introduce a revision of the bill under a new number. The supplanting bill, S. 2800, differed from its predecessor in one very material respect: authorization to establish more than one quality grade for any food was withdrawn, a concession which sharply diminished the opposition of publishing interests.

Hearings on S. 2800 were held before the full Committee on Commerce from February 27 to March 3, 1934. The opposition continued the attack begun at the hearings on S. 1944 although the attacks were rather more temperate. Consumer representatives were present, greatly outnumbered by industry spokesmen. Mr. Kallet of Consumers Research repeated his attack on Senator Copeland, a tactic which largely impaired the reception given his subsequent analysis of the deficiencies of the bill. Dr. Woodward from the A.M.A. in his appearance denied a prevalent charge that the A.M.A. had written the bill or was a moving force behind it and then corroborated that statement by the tepidity of his support of the measure.

At these hearings there first became evident a source of opposition which was later to produce the greatest defeat for the advocates of the bill. Commissioner Ewin L. Davis of the Federal Trade Commission appeared at the suggestion of the committee to discuss the bill from the standpoint of the jurisdiction of the Commission over false advertising. Although denying that he was opposing the bill, Commissioner Davis submitted amendments which would have required false advertising

¹⁸ This bill was prepared by Charles Wesley Dunn, counsel for a number of important trade associations in the field. * * *

cases to be brought before the Federal Trade Commission (hereinafter called the "FTC") instead of the courts.

Little progress on the bill was made during the remainder of the session. A number of amendments were made in committee, some weakening, some strengthening. On May 16 the bill came on the floor of the Senate from which it disappeared after an hour's discussion.

* * *

With the beginning of the first session of the 74th Congress came a new bill, S. 5, introduced by Senator Copeland on January 4, 1935. S. 5 did not differ very consequentially from the state which S. 2800 had reached by the end of the previous session but it was altered materially in form, the definitive provisions being grouped by commodities rather than by types of offenses. With the introduction of the bill there began once more the familiar story of demands for amendments, some of which were yielded to. Senator McCarran reintroduced his bill and soon after Representative Mead of New York introduced a bill prepared by Mr. James F. Hoge, counsel for the Proprietary Association which comprises the leading proprietary drug manufacturers. A subcommittee of the Commerce Committee with Senator Bennett C. Clark of Missouri as chairman, held hearings on S. 5 for three days early in March.

On March 22d President Roosevelt sent a special message¹⁹ to the Congress in which, after pointing to the need for maintaining high standards of integrity in food, drugs, and cosmetics and to the fact that "loopholes have appeared in the old law which have made abuses easy," he said:

"It is time to make practical improvements. A measure is needed which will extend the controls formerly applicable only to labels to advertising also; which will extend protection to the trade in cosmetics; which will provide for a cooperative method of setting standards and for a system of inspection and enforcement to reassure consumers grown hesitant and doubtful; and which will provide for a necessary flexibility in administration as products and conditions change. * * * It is my hope that such legislation may be enacted at this session of the Congress."

Earlier the same day the Committee on Commerce had reported out S. 5, still more changes having been made. It reached the floor of the Senate on April 1, 1935, and there began the most extended debate on the measure which took place in either house during its five years of consideration.

By this time the major issues which were to dominate the controversy over the bill in the succeeding three years had become apparent, and before resuming the narrative I shall

¹⁹ For the text of this message, see 79 Cong. Rec. 4262 (1935).

describe them briefly. The first of these issues related to the power to 'make "multiple seizures." Under the old Act the F. & D. A. had power to institute a criminal prosecution against an offender and to seize an offending article pursuant to court process. The article seized was condemned unless an interested party intervened as claimant and the government failed to prove the article to be adulterated or misbranded in violation of the Act. Where the F. & D. A. had cause to believe that a food or drug constituted either a danger to health or a gross fraud on the consumer it was its practice to seize the product widely to discourage dealing in it. This procedure was at once an effective method of consumer protection and a heavy burden to the producer who, if he believed his goods to comply with the law, was compelled to intervene in actions pending in a large number of jurisdictions. Moreover, these jurisdictions would often be remote from his place of business.

The drive to restrict the power to make multiple seizures was led by the Proprietary Association. Especially prominent in this effort of the Association were representatives of the Vick Chemical Company of North Carolina, but that company's objective was shared by many other large concerns, among them the Lambert Pharmacal Company of Missouri, the maker of "Listerine." It was perhaps not surprising, therefore, that Senators Josiah W. Bailey of North Carolina and Clark of Missouri, both members of the Committee on Commerce and able debaters, should enter the lists on behalf of their industrial constituents to engage in the familiar and congenial task of combatting Bureaucracy.

The second major issue was whether control of advertising of foods, drugs and cosmetics should be given to the F. & D. A. or whether the power of the FTC, which already had jurisdiction of interstate advertising of all commodities, should remain exclusive. Since, during the twenty-odd years which the FTC had enjoyed this jurisdiction, there had developed the condition which had led to the demand for new controls over advertising, a proposal which looked to the continuation of the *status quo* seemed palpably inadequate as a reform measure. The principal objections voiced to FTC control were directed to the fact that its "cease and desist" procedure had little or no deterrent effect on the advertisers' tendency to hyperbole, since the most rigorous penalty for an offense would be a Commission order not to do it again, an order which if violated could lead to nothing more drastic than a judicial order not to do it again.²⁰ Other objec-

²⁰ FTC Act § 5, 15 U. S. C. § 45. If a cease and desist order were violated, the FTC could sue in the Circuit Court of Appeals for an injunction restraining future violations. The FTC's powers were increased in 1938 by the Wheeler-Lea Act. * * * [See] * * * Handler, The Control of False Advertising under the Wheeler-Lea Act, [6 Law and Contemporary Problems 91 (1939)].

tions to retention of exclusive jurisdiction by the FTC were based on the fact that it had neither the scientific staff nor facilities comparable to the F. & D. A.'s and the fact that the Commission had often failed to proceed against advertising claims which the F. & D. A. had driven from the labels of the same products.

Undoubtedly there was at the outset a widespread if not universal preference among the affected industries for the FTC's continuation as supervisor of advertising. But as modifications were introduced into the food and drug bills' advertising provisions more and more of the leading food and drug advertisers—and publishers as well—came to the conclusion that effective control of the black sheep of the industries could be had only through F. & D. A. action. Possibly, therefore, the issue would not have been forced but for the vigilance of the FTC, which manifested a lively disinclination to see another governmental agency share its jurisdiction. In industry ranks the FTC found potent support among the proprietary drug manufacturers; the Proprietary Association and its smaller brethren, the United Medicine Manufacturers of America and the Institute of Medicine Manufacturers, all worked in its behalf. The principal Congressional champions of the FTC were Senator Clark and Chairman Clarence F. Lea of the House Committee on Interstate and Foreign Commerce.

The third major issue related to the judicial review of regulations promulgated by the Secretary of Agriculture. Although the power to make regulations having the force and effect of law was conferred on the Secretary by a number of provisions in the bills, a single one was responsible for making this issue so significant. All the bills contained a provision defining as adulterated any food containing an added poisonous ingredient, subject, however, to power in the Secretary to establish by regulation tolerances for poisons which could not be wholly eliminated in the production or preparation of foods for market. The foods most seriously affected by these provisions were the fresh fruits and vegetables. Efforts to remove insecticide sprays containing lead and arsenic from fruits and vegetables have never been wholly successful, a small residue of the poison remaining. The F. & D. A. has devoted for many years a substantial portion of its small annual appropriation to the effort to keep from the market fruits and vegetables containing poisonous spray residues in excess of the tolerances fixed by administrative order. Where its action has been contested, it has been necessary for the F. & D. A. not merely to prove that the tolerance was exceeded but that the amount of poison contained rendered the product dangerous to health. To establish to the satisfaction of a jury the fact that what seemed to be an infinitesimal amount of poison was actually a danger to health has proved exceedingly

difficult, and the power of the F. & D. A. to police this important field has been correspondingly impaired. By giving the regulations fixing tolerances the force and effect of law, it would become necessary for the government only to prove that the tolerance established thereby had been exceeded. This being done, the only defense left to the claimant would be an attack upon the regulation as unconstitutional. Hence the importance of judicial review.

The burden of protecting American constitutional liberties from this threatened encroachment was assumed chiefly by the International Apple Association, which had almost twice as many senatorial friends as there are apple-growing states. The Association had sustained a severe shock in the spring of 1933 when Assistant Secretary Tugwell had reduced the tolerance for lead arsenate from 0.02 grain per pound to 0.014 grain. Vigorous protest had led Secretary Wallace soon after to increase the tolerance to 0.02 grain, but the experience made a lasting impression on the apple-growers. Their objective thereafter was to broaden the power of the courts in passing upon the regulations so as to enable a court reviewing a regulation to reach its own judgment on the facts rather than to compel it to accept the Secretary's finding of fact if supported by substantial evidence—the criterion of validity established in federal administrative law. If the judgment of the district courts on such questions of scientific fact could thus be substituted for the opinion of the experts consulted by the Department, the apple-growers felt that they could face the future with aplomb. Of course the amendment they advocated would apply equally to court review of regulations issued under other sections of the Act.

To return to the narrative, the debate on S. 5 in the Senate in the spring of 1935 revolved chiefly about the first of the three issues noted above—multiple seizures. Senator Bailey sought by amendment to limit the power of seizure in misbranding cases to one seizure only, except where, on an order to show cause, the Secretary showed that the article was "misbranded in manner and degree as to render such article imminently dangerous to health." This would have left unimpaired the power to make multiple seizures of adulterated goods, but to restrict this power Senator Bailey offered a further amendment transferring to the section defining misbranding the provision declaring a drug to be adulterated if "dangerous to health under the conditions of use prescribed in the labeling or advertising thereof."

The effect of these two amendments was to leave proprietary drugs virtually immune from multiple seizure. Adulteration in such products is rare since they need comply with no standard

save their own. Only a very few such drugs are "imminently dangerous to health" in the sense that their administration will cause physical injury. The real danger that is caused by the ineffective nostrum comes from its use in conditions where the safety of the sufferer is dependent upon the prompt application of appropriate remedies. For example, use of "Banbar," an extract of the horsetail weed, by a diabetic in lieu of insulin, would lead to death just as surely as if the harmless weed were a deadly poison. Again, if another influenza epidemic brought on the market a flood of antiseptics, counter-irritants, laxatives and pain-killers labeled or advertised directly or indirectly as efficacious in the treatment of influenza and pneumonia, then, under the amendments advocated by Senator Bailey, the F. & D. A. would be unable to make more than a single seizure of any offending product until, some months later after the crisis had passed, it succeeded in securing a favorable judgment in the action. Senator Copeland was impassioned in his opposition to the amendments, but he stood alone in the debate and was scarcely a match for Senators Bailey and Clark. The amendments were adopted by a vote of 44 to 29.

With these and further amendments, including one fathered by Senator Vandenberg which provided that the single seizure action allowed by the Bailey Amendment should on "motion, be removed for trial to the jurisdiction of the claimant's residence" (thereby assuring a jury drawn from the manufacturer's rather than the consumer's bailiwick) the bill was passed by the Senate on May 28, 1935, without a record vote.

This bill was then referred to the House Committee on Interstate and Foreign Commerce and a sub-committee of five representatives under the chairmanship of Representative Virgil Chapman of Kentucky was appointed to hold hearings. These hearings, held on twelve days in July and August, 1935, brought forward the same group of opponents but their reception differed strikingly from that accorded them by the Senate committee. Senator Copeland had on occasion taken issue with persons testifying before his committee, but seldom did he probe into their records or those of the products which they represented. Representative Chapman, however, obtained at an early stage in the hearings information with respect to the products represented by persons appearing before the sub-committee. His examination of witnesses based on this information, although conducted with the utmost suavity, must, if the record affords adequate evidence, have been productive of extreme discomfort to a number of witnesses. The nearly 800 pages of testimony before this sub-committee contains as lively reading matter as may be found in any of the proceedings of Congress or its committees, but seem-

ingly the testimony barely met the standard of "news fit to print."²¹

In 1936, action on the bills was confined to the committees until late in the session, the second of the 74th Congress. In May the House Committee reported out a bill which bore striking testimony to the labors of the FTC and its industry supporters. The House amendments to S. 5 improved in some respects the provisions of that measure as it had passed the Senate, especially as regards multiple seizure, but the House bill gave exclusive jurisdiction to the FTC to deal with false advertising. The bill reached the floor of the House on June 19, 1936, on a motion to suspend the rules, which permitted only twenty minutes debate on each side. At the expiration of the allotted forty minutes, the bill was passed by a vote of 151 to 27.

Conferees were appointed from both houses and, in the conference which followed, the house conferees prevailed on most points but a deadlock was reached on the issue of jurisdiction over false advertising. An eleventh-hour compromise was attempted by Senator Copeland who moved that the Senate recede from its disagreement to the House amendment and agree to it with an amendment which he had hurriedly drafted giving jurisdiction to the F. & D. A. only over advertising affecting health. The motion promptly carried and the bill, thus amended, was sent to the House.

The debate in the House took place late in the evening of June 20. It was a short one. The issue was nicely defined by Representative McReynolds of Tennessee who said: "Now, Members of the House, what are you going to do about it? Are you going to turn this over to Tugwell for enforcement or are you going to leave it with the Federal Trade Commission with such men as Judge Davis and other men from this House on that Commission?" (Applause.) Representative Rayburn, majority floor leader, tried desperately to stem the tide, and in the course of his remarks observed: "There might be a little lobbying around here by some people, but there is nobody who has lobbied around this Capitol on any bill in the 23 years I have been in Congress more than the members of the Federal Trade Commission have lobbied on this bill, and I love the Federal Trade Commission." When the vote was taken, the score stood: Tugwell, 70; Judge Davis and the other House Alumni, 190. Thus ended the career of the food and drug bill in the 74th Congress.

* * *

When the 75th Congress began its first session in January, 1937, Senator Copeland succeeded in getting "S. 5" again for the

²¹ The New York Times carried news stories relating to the hearings after six of the twelve days, July 23, 25, 26, 30, and Aug. 9, 11, 1935. The six stories, all on inside pages, totalled a length, including heads, of approximately three columns.

designation of his bill. No hearings were held on this measure but few sections escaped amendment at the hands of the Senate Commerce Committee. * * *

However, the advocates of FTC control over food and drug advertising had begun a flank attack before the close of the first session of the 75th Congress which led to action early in the third session. In the first session the Senate had passed a bill introduced by Senator Wheeler of Montana which was designed to strengthen the sanctions of the FTC Act and to enlarge the FTC's powers by freeing it from the restrictions imposed by the United States Supreme Court in *Federal Trade Commission v. Raladam Company*,²² holding that the Commission could not issue a cease and desist order against false advertising unless injury to competition were shown. This bill was in the hands of the House Committee on Interstate and Foreign Commerce to which S. 5 had been referred. The chairman of that committee, Representative Lea of California, devised the plan of forcing the issue with respect to control of food and drug advertising by writing into the bill to amend the FTC Act special powers with respect to food, drug and cosmetic advertising.

* * *

The bill reached the floor on January 12, 1938. Those members of the House Committee who had unsuccessfully opposed the denial of jurisdiction of advertising to the F. & D. A. resolutely sought to secure the amendment of this bill so as to provide that persons violating the above provisions of the Act should be subject to a civil penalty of not more than \$3,000 or, if the commodity advertised were injurious to health, of not more than \$5,000. The purpose of this move was to give to the FTC Act the deterrent effect which the advertising provisions of the food and drug bill would have possessed. Under the bill proposed by Mr. Lea, no advertiser would have cause to fear more than an order to stop falsifying unless either his commodity were intrinsically dangerous or the government could succeed in the difficult task of proving intent to defraud.

Unfortunately for the minority committeemen, they were seeking to provide the FTC with teeth it did not want. Mr. Lea, speaking against the amendment after having "conferred with a representative of the Federal Trade Commission," said, "Its judgment is very decidedly opposed to this amendment because it would tend to be destructive of the successful operation of the Federal trade law. It would, in effect, convert the federal trade act, in effect, to a criminal statute primarily as to advertisements. * * * This is not the practical way to deal with business men."

The debate was a lively one in which the record of the FTC was vigorously attacked, but the outcome seems never to have been in doubt. When the question on the bill was taken, there were—ayes, 107; noes, 10.

The House and Senate conferees adopted the House bill. When the conference report came to the Senate floor on March 14, 1938, Senator Copeland pointed out the ulterior purpose of the House bill, but he too endeavored to strengthen its provisions. In the course of the debate he admitted that "the House will never agree to turn over to the Food and Drug Administration the control of advertising of drugs and cosmetics." Without a record vote the Senate agreed to the report, and with that action all hope was lost for the retention of the advertising provisions in S. 5.

Before this session had begun a tragedy occurred which was directly responsible for adding a new and important provision to the drug control legislation. At least 73, perhaps over 90, persons in various parts of the country, although chiefly in the South, died as a result of taking a drug known as "Elixir Sulfanilamide," manufactured and sold by the S. E. Massengill Company of Bristol, Tennessee. This product had been prepared in order to render the valuable new drug, sulfanilamide, available in liquid form. Diethylene Glycol was used as a solvent. Investigation later showed that the pharmacist on the manufacturer's staff checked the product merely for appearance, flavor, and fragrance. Tests on animals or even an investigation of the published literature would have revealed the lethal character of the solvent. When reports of the fatalities began to appear, the F. & D. A. began an immediate search for the 240 gallons of the product which had been distributed throughout the country. By dint of persistent and ingenious efforts the F. & D. A. with the cooperation of other governmental agencies and dealers, was able to recover almost the entire stock distributed. Yet the only legal basis for the F. & D. A.'s intervention was the fact that the preparation was not an "elixir" since that term may properly be applied only to an alcoholic solution. The product was therefore misbranded. The label, incidentally, did not mention the presence of the fatal ingredient, diethylene glycol.

Even if any of the bills (including S. 1944) had been enacted previously it is quite possible that this disaster would have occurred, although the basis for seizure would not have had to rest on the fortuitous circumstance of choice of an inapt name for the product, since the drug would clearly have been dangerous under the conditions of use prescribed for it. Accordingly, in the brief second session, Senator Copeland introduced a bill, S. 3073, which forbade the introduction into interstate commerce of "any drug * * * not generally recognized as safe for use"

under the conditions prescribed in the labeling thereof "unless the packer of such drug holds a notice of finding by the Secretary that such drug is not unsafe for use." Machinery was provided to enable the Secretary to make such a finding. A similar, but more complete, bill, H. R. 9341, was introduced in the House by Representative Chapman. Senator Copeland's bill was passed by the Senate without debate on May 5, 1938. The Chapman bill, with minor changes, was included in the committee version of S. 5 as finally reported to the House, and in this form was enacted into law.

Meanwhile the last major battle of the campaign was impending. The embattled apple-growers were determined not to allow the established principles of administrative law to govern the judicial review of food and drug regulations. They succeeded in persuading a majority of the House committee to report out a bill containing judicial review provisions which embodied a part of their objectives. The bill added a new procedure for the review of regulations, permitting suits to be instituted in the federal district courts within 90 days after the issuance of regulations to enjoin the Secretary from enforcing them. Although the provision was silent as to the scope of the court's review, it permitted the court to take additional evidence bearing on the validity of a regulation where cause was shown for failure to adduce the evidence at the administrative hearing. When one considers that there are over 80 district courts in the United States and that an adverse decision by a single one of them would prevent enforcement of a regulation throughout the nation, probably for months, quite possibly for years, the drastic character of the provision becomes apparent. Moreover, this special procedure was expressly made supplemental to "any other remedies provided by law," so those affected could, if they chose, await action under the regulation before attacking it.

Six members of the committee joined in a vigorous minority report which incorporated a letter from Secretary Wallace written in response to an inquiry from Representatives Chapman and Mapes of Michigan in which the Secretary expressed the judgment that if the judicial review provision "remains in the bill its effect will be to hamstring its administration so as to amount to a practical nullification of the substantial provisions of the bill. * * * It is the department's considered judgment that it would be better to continue the old law in effect than to enact S. 5 with this provision." The Department of Justice in a memorandum had also strongly criticized the provision.

The Committee's action aroused even more protests from consumer sources than the Bailey Amendments had inspired. Even the Journal of the American Medical Association editorially castigated the move. When the bill reached the floor, the minority members presented their case vigorously, but apples out-

weighed arguments. On June 1, 1938, the bill passed the House without amendment on this point.

Conferees were appointed by the Senate and House respectively on June 2 and 3. On June 11, they reported.²³ As was expected, the advertising control provisions of the Senate bill were eliminated. The judicial review provision of the House bill was accepted after a revision which materially diminished the objections to that section. On the multiple seizure limitation, a compromise was reached which, in my opinion, renders it innocuous²⁴ the Senate restriction on venue in multiple seizure situations was also relaxed, to the advantage of enforcement.²⁵ With few exceptions, the other changes made for a stronger law.

The Senate agreed to the conference report without debate on June 10, 1938. Three days later, after a flurry of protest from apple-minded Representatives, the House also agreed, and the long fight was over. The bill was signed by President Roosevelt on June 25, 1938.

II

C. PERMISSIBLE AREAS FOR INFLUENCING AND GUIDING LEGISLATIVE ACTIVITIES

(a). On the Federal Level

The foregoing materials raise this important question for the operating lawyer: how far may he go in influencing and guiding legislative activities without running afoul of existing restrictions on "lobbying"? On the federal level, there is the Federal Lobbying Act of 1946²⁶ to contend with. What does it endeavor to regulate? How effective will its regulatory machinery likely be? These and other problems are explored in the following study:²⁷

²³ For the conference report, with a statement of the managers on the part of the House, See H. R. Rep. No. 2716, 75th Cong., 3d Sess. (1938), reprinted in 83 Cong. Rec. 9088-9095 (1938).

²⁴ Multiple seizure of a misbranded article is permitted where the article has been the subject of a prior judgment favorable to the United States or where the Secretary has probable cause to believe that the article is dangerous to health or that the "labeling is fraudulent, or, would be in a material respect misleading to the injury or damage of the purchaser or consumer." § 304(a), 21 U. S. C. § 334(a).

²⁵ The claimant can move for consolidation of the cases either in any district where one of the cases is pending or "in a district of reasonable proximity to the claimant's principal place of business. § 304(b), 21 U. S. C. § 334(b). The Senate provision had located venue at the place of business.

²⁶ The text of this Act is set forth in the Supplement *infra*.

²⁷ The following may also be helpful to those seeking additional materials on the problem of the permissible area of lobbying activities. The Federal Lobbying Act of 1946, (1947) 47 Columbia L. Rev. 98, Federal Regulation of Lobbyists (1947), 15 Geo. Wash. L. Rev. 455, Zeller, State Regulation of Legislative Lobbying (1946), 5 Council of State Governments, the Book of the States.

IMPROVING THE LEGISLATIVE PROCESS: FEDERAL REGULATION OF LOBBYING²⁸

56 Yale L. J. 304, 306-311, 318-327 (1947)²⁹

THE PROBLEM

If lobbying is defined in its broadest terms as any attempt by individuals or groups to influence governmental decision, it is apparent that in some form it inheres in all government. American history is full of examples of legislation passed at the instance of, and for the benefit of, special interests. But lobbying today is both qualitatively and quantitatively a different problem from lobbying in the past. Whereas the old-style lobby, confined almost entirely to representatives of business interests, operated secretly and depended for its success upon personal solicitation of legislators, often accompanied by corruption, such methods are largely obsolete today. Modern lobbyists, or legislative agents, act on behalf of almost every conceivable business, economic, and social group, generally operate openly and frankly, and rely upon public opinion, real or stimulated through judicious use of publicity and propaganda, to compel legislative action.

Fundamental reasons for the transition from old to new lobbying are to be found in the same considerations which have given rise to demands for functional representation. As the technological barriers to group organization on a national scale have been removed, the common interests of workers, farmers, professional men and social reformers have led each to strive to participate in governmental decisions. Increased public scrutiny of the legislative process, a consequence of the growth of radio and press services, has made legislators more conscious of the force of public opinion. Pressure groups with large memberships are an effective threat to an elective office holder through the votes they control and the large segment of public opinion they represent; those with a smaller popular base can secure legislative consideration of their proposals only by stimulating or feigning public approbation.

Legislative investigations aimed at disclosing the extent of lobbying practices bear striking testimony to the effectiveness of utilization of mass channels of propaganda provided by the newspaper, the radio, the school, the theater, and the church. Pressure can be brought on legislators by publicity campaigns designed to prompt constituents, within or without the pressure group, to bring influence to bear by writing letters or sending telegrams; at election dates, candidates, regardless of party affiliation, considered favorably disposed toward group interests can be supported by the organization; or public opinion can be

²⁸ [Ed.] The footnotes are omitted.

²⁹ Reprinted with the permission of the Yale Law Journal.

skillfully moulded to identify the public interest with legislation favored by the group.

To supplement these indirect methods of influencing legislation most pressure groups maintain a Washington expert, and a technical information service. The expert, or lobbyist, makes the group's views known to legislators either through direct contact, testimony before committees or the submission of written statements, often carefully documented by highly paid legal counsel. He undertakes to provide extensive factual surveys to support his position, analyze legislation, draft bills, or perform any other service the congressman may desire. In addition he keeps the organization posted on the status of bills in committee or on the floor which may affect the group.

Even if no practical or constitutional difficulties were encountered, few observers today would advocate the abolition of pressure groups or forbid the activities of lobbyists. In addition to providing an unofficial form of functional representation, pressure group activities which publicize the legislative process, focus attention upon the voting records of congressmen, and keep the public informed as to the content and significance of legislative proposals are desirable in a democracy. The expert analysis of bills made by the competent lobbyist before congressional committees, and the link he provides between legislators and a large segment of the public may well improve the quality of legislative decision. While the larger and more cohesive the interest represented the more justification can be found for its activities, it remains true that the smallest minority has a right to be heard. It is hopeless to classify lobbies in terms of "good" or "bad," i.e., those which concern themselves with what they conceive to be the public welfare and those which work for the direct interests, usually economic, of their membership. All lobbies identify their interests with those of the general public and may, in particular situations, be justified in doing so. The danger to rational legislative decision lies not from hearing the claims of organized groups, but from inability to determine when those claims legitimately represent the welfare of the general public. This difficulty stems from the ignorance of legislators amidst the growing complexity of governmental functions, the unequal power of pressure groups, and the abuses which have survived the old lobby or arisen in the new lobby.

The evils disclosed by legislative investigations of lobbying fall roughly into two categories: (1) activities which leave the public and legislators with inadequate or unbalanced information on which to make decisions; and (2) activities which coerce or corrupt legislators.

Pressure group propaganda aimed primarily at influencing the public is often characterized by misrepresentation or distortion of fact, made more effective by concealment of source.

When the source of a statement is undisclosed, or appears non-partisan, legislators and the public, ignorant of motivation, cannot evaluate possible bias. Special interests have often created a favorable climate of opinion by such questionable practices as controlling newspaper editorial policy by placement or withdrawal of advertising; sending "canned copy" to country presses, hiring radio commentators and columnists to express favorable views, educators to write textbooks, and speakers to address clubs, schools, and churches without revelation of the contract of employment.

While most lobbyists openly admit their affiliations, many are prone to exaggerate the size and cohesion of their membership, and sometimes work for interests other than those they claim to represent. Often times one group will serve as a "front" for another, disguising the partisan nature of the views it advocates; some lobbies of this type exist on paper only. The forces of group opinion can be magnified by instigation of letters, telegrams, and phone calls to congressmen which, though the sole creation of a special interest group, create a false impression of opinion in the legislator's home district.

Activities which coerce or corrupt congressmen are a hangover from the old lobby, and, though of lesser importance, are occasionally resorted to. Included in this category are such crude devices as bribery, threats, and promises of financial security, as well as the subtler techniques of social pressure.

* * *

PROVISIONS OF THE [FEDERAL REGULATION OF LOBBYING] ACT

* * *

Registration of Professional Lobbyists:

Section 308(a) provides that "Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation * * * shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate * * *" Although "person" is defined elsewhere to include both individuals and groups, it seems clear that this section refers primarily to the individual lobbyist or legislative agent.

Certain exceptions to this provision should be noted. It does not apply to (1) persons who merely appear before a committee and "engage in no other activities to influence legislation"; (2) public officials acting in their official capacity; (3) newspapermen "acting in the regular course of business"; and (4) persons now required to report under the provisions of the Corrupt Practices Act.

Construed by itself, Section 308 sets up two conditions which must be satisfied before a person need register; he must be employed by another for a valuable consideration, and the purpose of the employment must be to influence legislation. But a difficulty arises as to whether this section, as well as the section which requires the organization to file an expense account, can be read alone or must be construed in the light of Section 307 which reads, in part, as follows:

"The provisions of this title shall apply to any person who * * * directly or indirectly solicits, collects, or receives money or any other thing of value to be used, *principally to aid, or the principal purpose of which person is to aid,* in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States." (Emphasis supplied.)

An interpretation of the Act which regards this section as qualifying all others would appear to have the support of legislative intent. On the floor of the House it was referred to by a member of the Committee as containing "the gist of the anti-lobbying provision." Furthermore, unless this section is read literally as restricting the application of the Act, the phraseology in italics above is surplusage and serves no useful purpose.

The superimposition of the language of Section 307 upon that of 308 leaves a third condition which must be fulfilled before registration is required: not only must the person be engaged for pay to influence legislation, but this must also be his principal activity. Although it is probable that most of the professional lobbyists in Washington could meet all three of these conditions and be required to register, there are at least three fairly common fact situations which may cause difficulty.

The first, and quantitatively the most important, of these situations is the case of the Washington lawyer, or law firm, who is retained by a special interest group or corporation to advise on pending legislation, render opinions as to its effect and construction, and possibly to draft bills which the group will submit to Congress. This work may be part of a large law practice.

The second situation is that of the officer of a corporation whose general duties have no reference to legislative matters but who comes to Washington to oppose a specific bill which may adversely affect the interests of his firm. He speaks to congressmen, testifies before committees, and distributes literature. Immediately after the passage or defeat of the bill he returns to his usual duties.

The third problem is that presented by the member of a group who comes to Washington to testify before a committee, distributes literature to congressmen, and takes his local Representative to dinner. The group pays his expenses but nothing more.

It is probable that the lawyer would not have to register. Although the phrase "influencing legislation" is a broad one, it is not within the legislative intent to include activities of counsel who merely perform advisory functions.

The corporate officer would, on the other hand, have to register before he undertook to engage in such typical lobbying activities. He might, of course, argue that he was not employed to influence legislation and that this was not his principal activity. But it is reasonable to assume that at least part of his corporate duties are of this nature and thus part of his compensation is derived for such activities. He is acting in his official capacity and not as an individual since it is the interests of the corporation which are affected by the pending legislation. Likewise, it is apparent that the word "principal" can be defined only if given a time reference. Although over a long period of time his principal activity may be with other corporate affairs, nevertheless his principal activity during his Washington stay is representing the corporate interest before legislators. The same rationale would apply to the lawyer in the first example if he went beyond interpreting legislation and approached congressmen, or if he himself submitted the drafted bill to a member of the legislature.

The representative of the interest group in the third illustration would not have to register. Although he meets the requirements of "influencing legislation" and "principal activity," he is not engaged for pay. The intent of Congress was not to limit in any way the individual's right to petition and was aimed only at professional lobbyists. If the compensation were merely actual expenses, it would not meet this test of employment for consideration, but if the sum given should substantially exceed expenses, he would have to register.

It may be difficult in any given case to determine just what constitutes "influencing legislation." The Act is indefinite in this respect and, since criminal statutes must define prohibited acts with certainty, this indefiniteness might make it technically defective. It is more likely, however, that courts will construe the provision strictly and require proof of actual intent on the part of an organization or individual to promote or defeat passage of a definite legislative proposal. Sufficient intent might, for example, be indicated by the presence of a legislative program endorsed and advocated by the group or its representative.

Filing of Expense Accounts:

A. By the Lobbyist:

Every person who registers under Section 308 is required to file in addition to the registration form a detailed report under oath of all money received and expended by him during the preceding calendar quarter. The report includes a statement identifying the person paid, the purposes for which the money was expended, and the legislation he is paid to support or oppose. He also must state the names of any papers or periodicals in which he has caused editorial or news matter to be published.

B. By the group or organization:

Section 305(a) provides that "Every person receiving any contributions or expending any money" to influence legislation must file a detailed statement every calendar quarter with the Clerk of the House. The term "person" again is defined to include any individual or group of persons, corporation, partnership or association, but excludes anyone registering under the Corrupt Practices Act.

As in the case of individual lobbyists the provisions of Section 305 are limited by Section 307. Thus construed, only those organizations which solicit money or receive contributions *principally* to aid in the influencing of legislation, or those receiving or expending money whose *principal* purpose is to influence, directly or indirectly, legislation must register. Obviously, the efficacy of the provision hinges on judicial interpretation of the word "principal."

Past congressional investigations have disclosed the fact that the most important pressure groups today are the National Association of Manufacturers, the Chamber of Commerce, the AF of L, the CIO, various trade and professional associations, labor groups, farm associations, and veterans' organizations. All of these special interests could argue that their principal activity is dissemination of information within the group for business or social purposes, trade promotion, or research, and that their lobbying activities, however extensive, are not the principal purpose of the organization. Such an interpretation would completely emasculate the Act; almost no group which exercises a substantial influence over public or legislative opinion would be required to register. Groups spending hundreds of thousands of dollars in propaganda activities would be exempt from reporting such expenditures, while other groups spending only insignificant sums would have to submit detailed accounts.

Despite the fact that a literal interpretation of "principal" makes little sense in the light of the factual situation, a strong argument to support this view can be made from the legislative history of Section 307. The Smith Bill, from which the section

was copied almost verbatim, originally used the phraseology "in whole or in part," and its sponsor substituted the word "principally" when the breadth of the former provision was brought to his attention. When asked whether labor and fraternal organizations would have to register, Representative Smith replied in the negative. He stated that the provision was intended to exclude many large organizations with thousands and millions of members who spent only a minor part of their funds influencing legislation.

In debate on the instant Act it was stated that the groups which were included in this section were "those whose principal purpose, not incidental purpose" was "to influence the passage of legislation." Juxtaposition of the words "principal" and "incidental" indicates that all purposes of an organization which are not "incidental" are in the category covered by the Act, suggesting a much broader meaning of the word "principal" than it might be given if taken alone.

A classification of activities which only incidentally influence legislation can be found in cases construing provisions of the Internal Revenue Code. Tax exemption is provided for gifts to charitable and educational organizations "no substantial part of the activities of which is * * * attempting to influence legislation." The test imposed by the courts has been whether or not the political activity is incidental to the main purposes of the organization, and relevant criteria include its stated purpose as determined by the articles of association, the amount expended in political activities as contrasted with other business, the presence or absence of a political program, and the controversial nature of the propaganda promulgated. Under these rules gifts to trade associations, labor unions, professional groups, and social reform organizations have been deemed taxable. Although the analogy of the instant problem to taxation is far from perfect, neither the classification of groups nor the criteria imposed seem entirely inapposite.

If a test case should bring Section 307 before the courts for judicial construction, any one of three results is possible. The court could construe "principal" narrowly to mean "primary," "chief" or "most important." Although this interpretation would exempt most pressure groups and vitiate the Act it would, nevertheless, have the support of Representative Smith's remarks, coupled with legal dogma requiring a strict construction of criminal statutes. Where, as in the case of the typical trade association or labor union, more than one activity is engaged in, the burden of proof upon the government to establish lobbying as the most important activity would seem to preclude many convictions. Exactly what the government would have to prove, assuming the difficulties of obtaining evidence were overcome, is largely a matter of conjecture; if the objective test of compari-

son of sums spent on lobbying with sums spent on other activities were adopted, would it be necessary to prove that more was expended on lobbying than any other activity or than all other activities, and over what period of time would it be necessary to compare such expenditures?

An interpretation of "principal" to mean "substantial," or any activity not purely "incidental," would overcome most of the objections to which the narrower construction is subject and has already proved workable in tax cases. While the problem of the correct time reference would still be present, the breadth of activities included would make it factually insignificant. Furthermore, this interpretation is the only one which appears reasonable in the light of the pressure group problem as apparently understood by the present Congress.

The third possible result of litigation would be a holding that Section 307 is so vague and indefinite as to require invalidation of the Act. There is little practical difference in a strict interpretation of the word "principal" and a holding that Section 307 violates the Constitution; in either case the operative effect of the Act would be negligible.

It should be noted that there is no interrelation between those who file statements under Section 305 and those who register under Section 308 as is common in state statutes. Thus, it is possible for an individual lobbyist to name an employer who need not file under Section 305. But if liberal interpretation is given to the word "principal," the correlation between the two lists should be high.

The quarterly statement of [a] group filed under Section 305 includes the name and address of all who contribute over \$500, the total sum of all contributions and the total expenditures including the name and address of those who receive an aggregate of ten dollars or more. Further provisions require that detailed accounts of contributions and expenditures be kept and preserved for at least two years.

ENFORCEMENT

Violations of any provisions of the Act are punishable by a fine not exceeding \$5,000 and imprisonment for not more than twelve months. In addition, conviction automatically disqualifies a person from attempting to influence legislation or testifying before a committee for three years with more severe penalties provided for violation of this provision. Although this latter sanction appears to be directed at the individuals registering under Section 308, the broad statutory definition of "person" makes it applicable to associations and groups as well. How it could be enforced against the latter is not clear, and in any event it could scarcely bind the individual members of a group without deprivation of their constitutional rights.

The inadequacies of the Regulation of Lobbying Act are in large measure attributable to the fact that despite evidence of a new and realistic congressional understanding of the problems raised by pressure group activity, the statutory vehicle for expression of its ideas was hurriedly drafted and modeled on anachronistic precedent. That the federal statute will be little more successful than its state counterparts is already indicated by the number of individuals and groups complying with its provisions. During the first quarter 36 organizations and 124 individuals filed statements under Sections 305 and 308. Only three important pressure groups complied with Section 305, others apparently relying on exemption by virtue of the "principal" requirement.

The most obvious weaknesses of the Act are the use of the word "principal" to restrict persons to whom the Act is applicable and the lack of adequate enforcement provisions. Such powerful pressure groups as the Chamber of Commerce and the NAM are construing the word narrowly and maintain that their principal purposes are trade promotion, education and research. Failure to submit accounts to the Clerk of the House indicates that most trade associations and labor organizations are adopting the same view. * * *

Failure to provide sanctions to overcome the procedural difficulty of criminally prosecuting unincorporated associations is an elementary drafting error which may seriously weaken the punitive provisions of the Act. As a consequence it is questionable whether a large proportion of pressure groups could be made subject to its penalties, a shortcoming best cured by providing that all expense accounts be signed by a responsible executive who is personally liable for violation. If no expense account is submitted, the officers of the association should be held.

The enforcement difficulties of the Act, however, are more extensive than those embodied in a mere technical drafting error. The Department of Justice will undertake prosecution of violators of the Act only when a violation is brought to its attention. The absence of provision for a special agency to investigate the activities of lobbyists has always meant non-compliance with state laws; there is no reason to believe that there will be a significant difference in the case of a federal statute.

One of the principal reasons for requiring registration of professional lobbyists was to reveal, in addition to their identity, the size and cohesion of the groups they claimed to represent. Such knowledge is indispensable to legislators seeking to evaluate the political force of divergent views. To this end the Senate Report recommended that the registration statement include evidence of bonafide membership, but this pro-

vision was never embodied in the bill as submitted to Congress. Not only should this information be required but it should be supplemented by a statement as to how the membership decides its lobbying policy and by what right the lobbyist speaks for the group. Democratic procedures within the group itself are necessary if lobbying activities are to be regarded as a legitimate manifestation of a functional need.

The instant Act confines itself to persons who exert pressure on Congress. The decline of Congress as a policy making body and the increased discretion exercised by administrative bodies have, however, effected a parallel shift in lobbying activities. No adequate law can ignore the pressures upon all branches of government, and registration of all those who lobby before governmental agencies should be included within the provisions of the Act.

Note: To the extent that influencing legislative activities includes the influencing of the election of legislators, the lawyer should, of course, acquaint himself with the federal, state and local laws which delimit and therefore mark out the permissible areas of such activity. On the federal level, see Federal Corrupt Practices Act of February 28, 1925, 43 Stat. 1070, as amended by No. 304 of the Labor Management Relations Act of June 23, 1947, 61 Stat. 149. On the state and local levels consult the laws of your jurisdiction.

(b) On the State and Local Levels

What the permissible areas are for influencing and guiding state and local legislative activities should be ascertained by a careful examination of relevant legislative materials and judicial decisions in the particular jurisdiction in which the would-be lawyer is apt to practice. Here, however, are a few worthwhile general observations:³⁰

"While the Federal Regulation of Lobbying Act [of 1946] represents the first federal statute passed with the end of bringing lobbying activities into the open, it has precedent in a number of state laws. In addition to the universal prohibition against giving, offering, or receiving bribes, thirty-five states have enacted statutes aimed at limiting lobbying abuses. All of these statutes, while differing in their specific provisions, proceed on the common principle that undesirable activities can best be controlled, not by prohibition, but by publicity.

The most frequent requirements of state laws are (1) registration, (2) filing expense accounts, and (3) prohibition of contingent compensation. The more comprehensive laws require regis-

³⁰ These are from *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 Yale L. J. 304, 313-15 (1947). Reprinted with permission of the Yale Law Journal.

tration of both the individual lobbyist and his employer with a governmental agency, usually the Secretary of State. Registration statements often include, in addition to name and address, specification of the legislation promoted or opposed, but here a very general answer suffices. Several states, following the pattern of the Massachusetts statute, make a distinction between 'legislative agent' and 'legislative counsel,' but this differentiation appears to serve no functional purpose.

In seventeen states the employer and lobbyist must also file detailed statements showing the amounts received and expended in promoting or opposing legislation, including an affidavit as to the agent's salary. These expense accounts are usually submitted from one to four months after the close of the legislative session and are open to public inspection.

The frequent provision forbidding compensation which is contingent upon the success of the lobbyist in attaining the desired legislation is merely legislative condemnation of a contract which courts have long regarded as opposed to the public interest and unenforceable.

A major weakness of all state statutes is the lack of adequate enforcement provisions. Although criminal sanctions are imposed for violation of the registration requirements, no special agency is charged with investigating either the accuracy or inclusiveness of the registration lists and financial statements. That Attorneys General have exhibited no particular desire to bring actions except in the case of flagrant violations accompanied by wide publicity is indicated by the wide variation in the number registering from state to state and year to year, and the absence of entries of large sums in expense accounts. A conclusion that the law is broken with impunity is inescapable."

Problem:

Assume that a law firm is retained by a Citizen's Committee in your state to help obtain passage of the proposed Model State Food, Drug and Cosmetics Act, a measure patterned after the Federal Food, Drug, and Cosmetics Act of 1938—designed to tighten state controls and to integrate them more properly with existing federal machinery. Never having engaged in such work, one of the senior partners of the firm, who has assumed charge of the problem, requests you to prepare a legal memorandum, advising him, what, if anything, need be done by the firm to comply with state restrictions on lobbying activities. Some of the matters, among others, with which the senior partner seems to be concerned are:

(a) Whether it would be legal for him:

(1) to visit legislators in their offices to explain the measure to them; (2) to invite some of them out for

dinner and entertainment; (3) to advise them on parliamentary strategy; and (4) to solicit aid from influential constituents who might be persuaded to exert "pressure" on the legislators.

(b) Whether there are any restrictions on the amount of money which may legitimately be spent on these activities; and

(c) Whether the law requires the reporting of such information as the membership of the Citizen's Committee, the amount of money the Committee has authorized the firm to spend, and the amount actually spent; and, if so, whether the firm may ignore these requirements on the ground that this information constitutes "privileged communications" between attorney and client.

What would you advise?

III

D. THE MECHANICS OF LAW-MAKING

(a) On the Federal Level

Granted the demarcation of the permissible areas for influencing and guiding legislative activities, it will be necessary for the lawyer working within these areas to have some working knowledge of the procedural mechanics involved in the law-making process. The lawyer engaged to promote a legislative measure will want to know the mechanics for assuring its birth; the one engaged to defeat it will want to know what machinery there is available for thwarting the measure. There are the purely formal aspects of law-making which must be understood—the step-by-step process of seeing a bill through; there are the parliamentary rules of procedure which control the manner in which the machinery involved in the process may be maneuvered to advance or defeat a proposal on its way to becoming law. The following should be helpful as an introduction to the formal aspects of the mechanics of law-making on the federal level:

THE FORMAL MACHINERY

ENACTMENT OF A LAW

PROCEDURE ON A SENATE BILL

Sen. Doc. No. 155, 73d Cong. 2d Sess. (1934)

Legislation originates in many different ways. The Constitution provides that the President "shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."

The President fulfills this duty by sending messages to Congress. Sometimes a general message is sent at the opening of a session in which he discusses general conditions in the country and recommends legislation on many subjects; but at other times

he sends brief messages suggesting legislation on one particular topic. Thus, at the special session of the Seventy-third Congress, President Roosevelt sent a number of brief messages from time to time, each making only one recommendation.

Those messages of the President are referred to committees in the Senate and in the House. It might be that some Senator will prepare a bill carrying out the President's recommendations and introduce it immediately upon receipt of the message. If this is not done, the committee considering the message may draft such a bill and report it to the Senate. The action in the House is similar.

Bills for raising revenue, under the Constitution, * * * originate in the House of Representatives.

A bill may originate in Congress simply as the work of any Member of the Senate or the House. The Member prepares his bill and introduces it; it is immediately referred to an appropriate committee, which will consider it and report it favorably if it thinks the proposed legislation is desirable.

It often happens that several Members may introduce bills that are very much alike. The committee considering them may combine the best features of several of them in a new bill; or it may write an entirely new measure and report it.

The right of petition is guaranteed the citizens of the United States by the Constitution and many petitions and memorials are sent to individual Senators and Representatives as well as to the Congress as a whole. These are referred to the proper committees for consideration, and some legislation originates in this manner.

ANNUAL APPROPRIATIONS

Funds for carrying on the work of the Government are provided in general appropriation bills, which, by custom, originate in the House. The procedure is, briefly, somewhat as follows. The heads of the various departments and agencies of the Government prepare estimates on the cost of doing their work for the year and submit these estimates to the Director of the Bureau of the Budget. He compiles them, gives careful consideration to the requests, and prepares a budget of expenditures for each of the Government establishments. This Budget is then submitted to the President and, after it is in a form which he approves, he transmits it to Congress.

The Appropriations Committee of the House drafts the various general appropriation bills and then they are acted upon by the House. The Senate, likewise, has an Appropriations Committee, which considers all of the appropriation bills and may amend them in any way that it sees fit. The Budget is for the guidance of Congress, and it is not obligatory upon either the House or the Senate to follow its suggestions. Frequently the Budget estimates are either increased or decreased by Congress.

The Government operates all of its business on a fiscal year starting on July 1 and ending on June 30, and the appropriations are generally for the fiscal year.

Bills which are not acted upon at a session retain their status at the next session, except that at the end of a Congress all such measures die. Bills are numbered when introduced, Senate bill numbers being designated with the prefix "S." and those of the House with "H. R."

SIMPLE, CONCURRENT, AND JOINT RESOLUTIONS

In addition to bills, there are Senate and House resolutions, Senate and House concurrent resolutions, and Senate and House joint resolutions which are designated, respectively, as "S. Res.," "H. Res.," "S. Con. Res.," "H. Con. Res.," "S. J. Res.," and "H. J. Res.," with their individual numbers.

Senate and House resolutions, frequently termed "simple resolutions," deal with matters exclusively within the jurisdiction of the respective Houses, and require no action thereon by the other body. Concurrent resolutions, which, under the practice of the two Houses, do not deal with legislative matters, require the concurrence of the two Houses only. They are not signed by the Speaker and Vice President, but are attested by the Secretary of the Senate and Clerk of the House, and transmitted to the Secretary of State to be published in the Statutes at Large as a part of the proceedings of Congress. Containing no legislative provisions, they therefore do not require the approval of the President. The parliamentary procedure on joint resolutions is identical with that on bills, with the exception of joint resolutions proposing amendments to the Constitution of the United States, which, under the Constitution, must be passed by a two-thirds vote of each body. For this reason, such joint resolutions do not require the approval of the President, but are presented directly to the Secretary of State, to be transmitted to the various States for ratification by the legislatures thereof.

INTRODUCTION AND REFERENCE

The first two hours of the daily session of the Senate, if an adjournment, as distinguished from a recess, was taken on the previous legislative day, constitute what is known as the "morning hour." Business during this period is governed by Rules VII, VIII, and IX of the standing rules of the Senate. When a recess is taken the legislative day is continued, thus eliminating the morning hour on the next day and permitting the Senate to resume immediately the consideration of its unfinished business. A legislative day is terminated only by an adjournment. However, on recess days, by unanimous consent, bills are frequently introduced and referred, others reported, and some passed, usually without any debate.

Rule VII provides the order in which morning business shall be called for, one order of business being "the introduction of bills and joint resolutions." Pension bills, private claims bills, and bills to correct military or naval records may, after the morning hour, be introduced and referred by delivering them to the Secretary of the Senate, who has them noted in the Senate Journal, which is the official record of the proceedings of the Senate, and also in the Congressional Record.

When the above order of business is reached, a Senator desiring to introduce a bill of a public nature addresses the Vice-President (or whoever is presiding) as "Mr. President," and, having been recognized, he offers for introduction a bill, which he sends to the Secretary's desk. Should any Senator object, its introduction is postponed for one day. If there be no objection (and it is seldom interposed), the Chief Clerk or Legislative Clerk reads the bill by title, and, by unanimous consent, it is read the second time, by title also, unless in each case the Senate otherwise orders. If objection is made to its second reading, it also must be postponed for one day, under Rule XIV, which provides that a bill shall receive three readings, which shall be on three different days unless the Senate unanimously directs otherwise. It cannot be referred until it has been read twice. The reference desired is frequently indicated on the bill by its author, but when this is not done, and no request is made, the Vice-President announces the committee to which it will be referred; or, in the event a question arises as to its reference, the author, or any other Senator, may make a motion to refer it to a certain committee, which motion cannot be amended except to add instructions. Bills sometimes are ordered to lie on the table temporarily, to be taken up at a later date for reference or consideration without being referred. Reference of a Senate bill is not mandatory. Endorsements showing the author and reference are made on the bill at the Secretary's desk. These various proceedings are shown in the Congressional Record of that day and are noted in the Minute Book kept by the Journal clerk. After being referred the bill is sent by a page to the office of the Secretary of the Senate and numbered by the Congressional Record clerk. He delivers it to the bill clerk, who makes an entry in the Bill Book, showing the number, author, title, date, and reference. It is then turned over to the assistant Journal clerk for proper notation in the Senate Journal of the proceedings of that day, and it is subsequently sent to the Government Printing Office to be printed.

On the following morning, printed copies of the bill are delivered to the Secretary's Office, and to the Senate and House document rooms, the original being returned and placed in the files of the Senate.

COMMITTEE ACTION

The distribution clerk in the Secretary's Office delivers a printed copy of the bill to the committee to which it was referred, taking a receipt therefor. The clerk of the committee enters the bill upon the calendar of bills pending before that committee. Some committees have regular meeting days, while others meet only at the call of the chairman. When the committee meets the calendar is called by the clerk, and a particular bill taken up for consideration. If the bill is one of importance, it may be referred to a subcommittee, appointed by the chairman, for study and report thereon. It frequently happens that, where a matter is deemed to be of sufficient importance, and the committee or subcommittee desires information on the subject, hearings are held and witnesses called to give testimony. A subcommittee makes its report and recommendations to the full committee. Usually it is adopted by the latter, although it is of course within the power of the committee to reject it and adopt an entirely different report. Certain kinds of bills are nearly always referred by committees to departments of the Government for reports thereon. Particularly is this true of bills to correct military and naval records, to authorize the construction of bridges, and to pay claims against the Government. The report of the department frequently determines the nature of the committee's report. After consideration of a bill the committee may order it to be reported to the Senate favorably, either with or without amendment, as the case may be, or it may order an adverse report. Instances of the passage of a bill reported adversely by a committee are rare.

Most committees, for various reasons, do not act upon all bills referred to them. Unless the Senate discharges a committee from the further consideration of such a bill, it dies in the committee at the end of the Congress; or a committee may indefinitely postpone a bill, in which case no report is made to the Senate.

If a committee fails to report a bill to the Senate within what may be deemed to be a reasonable time, he, or any other Senator, has the privilege, under the rules, of entering a motion to discharge the committee from its further consideration. If objected to, however, this motion cannot be acted upon until one day has elapsed. If, when taken up, the motion is agreed to, the bill is thereby taken out of the jurisdiction of the committee. Only by unanimous consent can it be considered at that time; otherwise it must lie over a day. In the meantime it is placed on the calendar of bills under Rule VIII.

COMMITTEE REPORT

When a bill is reported from the committee, either by the chairman or another Senator designated for that purpose, it is

usually ordered to be placed upon the calendar. The action of the committee is endorsed on the bill reported, which is the printed copy previously delivered to the committee. It passes through the same channels in the Secretary's Office, and the proper entries are made on the records. It is reprinted, with calendar and report numbers shown, also the Senator reporting it, the date, and whether with or without amendment. Committee amendments are indicated in line type and italics. A written report may or may not be filed with the bill. The minority of a committee, if it desires, may present its views, or any member thereof may submit his individual views. These reports are printed.

CONSIDERATION OF BILLS

Frequently a Senator, when reporting a bill, or the author thereof, will request unanimous consent for its present consideration. Upon objection the report must lie over a day and the bill go to the calendar. If granted, and it is one of minor importance or of a local nature, the bill is usually passed with little or no debate. It may or may not be amended, it usually depending upon the recommendation of the committee in this respect. It is, however, within the right of any Senator to propose amendments to any bill under consideration, and, except in the case of general appropriation bills, germaneness to the subject matter is not required by the rules of the Senate. General appropriation bills, by universal practice, originate in the House of Representatives, and amendments in the Senate thereto proposing legislation frequently termed "riders," are prohibited by Rule XVI of the Standing Rules of the Senate. However, this rule may be suspended, under the precedents of the Senate, by a two-thirds vote, on a motion made pursuant to one day's notice in writing, required by Rule XL, to permit the consideration of such legislative amendments.

Rule VIII governs the consideration of the calendar of bills, and is as follows:

At the conclusion of the morning business for each day, unless upon motion the Senate shall at any time otherwise order, the Senate will proceed to the consideration of the Calendar of Bills and Resolutions, and continue such consideration until two o'clock; and bills and resolutions that are not objected to shall be taken up in their order, and each Senator shall be entitled to speak once and for five minutes only upon any question; and the objection may be interposed at any stage of the proceedings, but upon motion the Senate may continue such consideration, and this order shall commence immediately after the call for "concurrent and other resolutions," and shall take precedence of the unfinished business and other special orders. But if the Senate shall proceed with the consideration of any matter notwithstanding

ing an objection, the foregoing provisions touching debate shall not apply.

All motions made before two o'clock to proceed to the consideration of any matter shall be determined without debate.

On Mondays, when there is a morning hour, the call of the calendar can be dispensed with only by unanimous consent; but on any other day, following the announcement of the close of the morning business, it is in order for a Senator obtaining recognition to move to take up any bill on the calendar out of its regular order. The five-minute rule touching debate does not apply in this case, and the consideration of the bill may continue until the expiration of the morning hour at two o'clock, when the Presiding Officer lays before the Senate the unfinished business of the previous day. The consideration of the bill is thereby discontinued, but it retains its parliamentary status and place on the calendar. When a bill is reached during the call of the calendar, it may, on objection, be passed over without prejudice, or by a majority vote, considered notwithstanding the objection. In this case also the limitation on debate does not apply. A bill taken up is open to amendment, the amendments reported by a committee usually being first considered. The next step, after the amendment stage, is the engrossment and third reading of the bill. The reading is usually by title only, but, upon demand, it must be read in full. The question is then put upon its passage, which is carried by a majority vote. Amendments to the title are made after it has been passed. At any time before its passage, a bill may be laid on the table; postponed indefinitely (either of these motions having the effect of killing the bill); made a special order for a day certain; laid aside temporarily; or recommitted or referred to a different committee.

Most bills are passed by a viva voce vote only; that is to say, without a roll call; but, under the Constitution, a yea-and-nay vote may be had upon the demand of one fifth of the Senators present. In the event a reconsideration of the vote on the passage of a bill is desired, where there was a yea-and-nay vote, any Senator who voted for its passage or did not vote, may, on the same day or on either of the next two days of actual session of the Senate, make a motion to reconsider. On a viva voce vote, however, any Senator, under the precedents, may make such a motion, a majority vote only being required for its adoption. A motion to reconsider must be disposed of before the bill can be transmitted to the House of Representatives. Votes on amendments may be likewise considered.

A bill of major importance is never considered under the five-minute rule, provided in rule VIII, but it is taken up on motion, which, after two o'clock, is debatable, and thereby acquires a preferred status as unfinished business. This status gives it

priority, after the morning hour, over other measures except those privileged in their nature, such as conference reports and amendments between the Houses. Its consideration may be continued over a period of several days; but it may be displaced as unfinished business at any time by affirmative action upon a motion to take up another bill.

ACTION OF HOUSE

The printed bill used at the desk as the official copy, showing the amendments made, if any, and endorsed as having passed, is sent to the Secretary's office and delivered to the bill clerk, who again makes the proper entries on his records. He then turns it over to the enrolling clerk, who makes an appropriate entry on his records and sends it to the Government Printing Office to be printed in the form in which it passed the Senate. After its passage it technically becomes an act (not yet effective as a law), but it nevertheless continues to be generally referred to as a bill. The printed act is attested by the Secretary as having passed the Senate as of the proper date, and this is now termed the official engrossed bill. It is then messaged to the House of Representatives by one of the clerks in the Secretary's office, who is announced by the Doorkeeper of the House. Upon being recognized by the Speaker, the Clerk announces that the Senate has passed a bill (giving its number and title), in which the concurrence of the House is requested. It is usually referred by the Speaker to the appropriate committee, which may subsequently report it back to the House, either with or without amendment, or adversely. It is then placed upon one of the calendars of the House, depending upon the nature and purpose of the bill. If, however, a substantially similar House bill has been favorably reported by a committee, the Senate bill, unless it creates a charge upon the Treasury, is usually not referred, but remains upon the Speaker's table. It may subsequently be taken up on motion of the committee, or substituted for such House bill when consideration of the latter is had. The Senate bill when taken up is read the second time for amendment, and the third time by title only, unless a Member demands its reading in full. If passed by the House, either with or without amendment, as the case may be, such action is attested by the Clerk of the House on the Senate engrossed bill, and is messaged back to the Senate. If no amendments be made, no further action by the Senate is necessary; and the bill is ready to be enrolled, as hereinafter set out. If amendments have been made, they are printed separately, being numbered for convenience and also attested by the Clerk. These are called the House engrossed amendments. They accompany the Senate engrossed bill and the concurrence of the Senate is requested in the amendments.

SENATE ACTION ON HOUSE AMENDMENTS

The House amendments in due course are laid before the Senate by the Presiding Officer, either upon his own initiative, or upon the request or motion of a Senator, usually the author of the bill or the Senator who reported it from the committee. They are read, and may, by unanimous consent, be considered en bloc. Any one of the following motions may then be made, taking precedence in the order named: (1) A motion to amend the House amendments; (2) a motion to agree to the same; (3) a motion to refer them to a standing committee of the Senate for consideration; and (4) a motion to disagree and ask a conference of the House. Usually this motion empowers the Presiding Officer to appoint the conferees on the part of the Senate, although the Senate may appoint them directly. The number is usually three, but sometimes five, and occasionally a larger number. Some of the House amendments may be agreed to, others agreed to with amendments, and still others sent to conference.

In the case of motion No. 1, the amendments made by the Senate to the House amendments are transmitted to the House with a request for its concurrence therein. If the House concurs or agrees (the words being used synonymously), the legislative steps in the passage of the bill are completed. The House, however, may amend the Senate amendments to the House amendments, this being the second, and therefore the last, degree of amendment. The House amendments to the Senate amendments are transmitted to the Senate with a request for concurrence therein. The Senate may agree to some, and disagree to others and ask a conference with the House thereon, as provided by motion No. 4. A conference may be asked at any stage of consideration of the amendments. If the Senate agrees to all of the House amendments to the Senate amendments, such action brings the two Houses into complete agreement, and likewise completes the legislative steps.

In the second case, the concurrence of the Senate in the House amendments, also completes the legislative steps.

In the third case, the standing committee, after consideration, may recommend action indicated in either motions 1, 2, or 4, and make such motion accordingly.

CONFERENCES

In the fourth case, the motion having been agreed to and the conferees named, the Senate informs the House, by message, of its action. All papers accompany the various messages between the Houses, and neither body can act unless the papers are in its possession. It is the usual practice of the House to insist upon its amendments en bloc, agree to the request for a conference, and appoint its conferees. They do not have to be the

same in number as the Senate conferees. Each House, at a certain stage, may instruct its conferees, but such action is not often taken, as conferences are presumed to be full and free. If the Senate's request is granted, the House so notifies the Senate. The papers, comprising the Senate engrossed bill, the House engrossed amendments, the Senate engrossed amendments to the latter, if any, and the various messages of transmittal, are turned over to the Senate conferees by the delivery clerk in the Secretary's office, who takes a receipt therefor. The conference is usually held in the Senate wing of the Capitol by arrangement. The conferees take up the amendments, generally in their order, for consideration. A majority of each group controls its action, so that if one group has a larger number of conferees it has no voting advantage over the other.

As a result of deliberations the conferees may recommend (1) that the House recede from all or certain of its amendments; (2) that the Senate recede from all its disagreement to all or certain of the House amendments, and agree to the same (3) that the Senate recede from its disagreements to all or certain of the House amendments and agree to the same with amendments, and that the House agree thereto; or (4) they may report an inability to agree on all or certain of the amendments. Usually, however, there is a compromise. Conferees have limited powers. They can deal only with the actual matters in disagreement. They cannot insert new matter, or leave out matter agreed to by both Houses; and if they exceed their authority a point of order will lie against the report.

CONFERENCE REPORTS

The recommendations of the conferees are incorporated in reports made in duplicate, which must be signed by a majority of each group of conferees. If there are amendments upon which they were unable to agree, a statement to this effect is included in the reports. One report, together with the papers, is taken by the House conferees or managers, as they are termed in that body, and subsequently presented by them to the House, with an accompanying explanatory statement as to its effect upon the matters involved. The report must lie over a day in the House for printing, except during the last six days of a session. The Senate conferees also may present their report for printing, but it cannot be considered prior to action by the House, which has the papers. Conference reports are privileged in both the Senate and House. They cannot be amended, but must be voted upon as an entirety. The report, if adopted by the House, is transmitted, with the papers, to the Senate, with a message announcing its action. The Senate conferees may then present their report, if not previously submitted. It does not have to lie over a day, as in the House, but on motion, which is not debatable, may be

immediately considered. The report itself may be debated. It cannot be recommitted at this stage, inasmuch as the House has already acted thereon. The House, at the time of passage of a Senate bill with amendments, has a right to insist upon its amendments and ask a conference. In such a case, if the Senate granted the request, the report would first be considered by the Senate, which, by a majority vote, could recommit it to the conferees.

If the conferees reached a complete agreement on all the House amendments, and the House has previously agreed to the report, the adoption by the Senate completes the legislative steps. If, however, there are amendments upon which an agreement was not reached by the conferees, the adoption of the report by both Houses leaves the parliamentary status of these particular amendments the same as if no conference had been held. The House, after adopting the report, however, could recede from all or any of its amendments, and further insist upon others, with or without a request for a conference thereon. The Senate, as to the amendments still in disagreement, could then take any one of the four steps originally open to it, with the exception, in the fourth case, of modifying the motion so as to further insist upon its disagreement to the amendments and ask or agree to the conference, depending upon the action of the House. Usually the same conferees are appointed by the two Houses. They may agree on some amendments and again fail to agree on others. Unless all the differences are finally adjusted, either by a subsequent conference, or by direct action on the floor of the Houses, the bill will fail. If a conference report is rejected by one of the Houses, it so notifies the other body and usually requests another conference; but sometimes it merely notifies it of its action, leaving further steps to be taken by the latter. Endorsements showing the various legislative steps, as and when taken, are made on the engrossed Senate bill.

If and when the two Houses reach a complete agreement on all the amendments, the papers, with the exception of the last message to the House, are delivered to the enrolling clerk of the Senate. He prepares a copy of the bill in the form as finally agreed upon by the two Houses, and sends it to the Government Printing Office for enrollment. The original papers are retained in the files of the Senate.

SIGNATURES OF SPEAKER AND VICE-PRESIDENT

Upon receipt of the enrolled bill from the Government Printing Office, the Secretary of the Senate makes an endorsement thereon, certifying that the bill originated in the Senate. The delivery clerk then delivers it to the Committee on Enrolled Bills of the Senate, taking a receipt therefor. If found to be in the form agreed upon by both Houses, the chairman of the commit-

tee attaches a slip thereto, stating that the bill (giving its number and title) has been examined and found truly enrolled. The committee then delivers it to the Committee on Enrolled Bills of the House of Representatives, the chairman of which presents it to the Speaker of the House for his signature, which is attached and announced in open session. Every enrolled bill, whether originating in the Senate or the House, is signed first by the Speaker. The bill is then transmitted to the Senate, where it is likewise signed by the Vice-President, or, in his absence, by the President pro tempore. If both these officials are absent, the President pro tempore has authority to name, in writing, a Senator to perform the duties of the Chair, which thereby empowers the latter to sign enrolled bills. After being signed by the Presiding Officer of the Senate it is again delivered to the Committee on Enrolled Bills of the Senate, which presents it to the President of the United States for his approval, taking a receipt therefor. The chairman of the committee reports the fact of such presentation, and the date thereof, to the Senate.

An error discovered in a bill after the legislative steps in its passage have been completed may be corrected by authority of a concurrent resolution, provided, of course, it has not been approved by the President. If not enrolled, the error may be corrected in the enrollment; if enrolled and signed by the presiding officers of both Houses, or by the Speaker, such action may be rescinded, and the bill correctly reenrolled; if presented to the President, but not acted upon by him, he may be requested to return it to the Senate for correction as above indicated. If, however, the President has approved the bill, and it has thereby become a law, any amendment of such law can only be made by the passage of another bill, which must take the same course as the original.

PRESIDENTIAL ACTION

The President, under the Constitution, has 10 days (Sundays excepted), after the bill has been presented to him, in which to act upon it. If the subject matter of the bill is within the jurisdiction of a department of the Government, or affects its interests in any way, he may, in the meantime, in his discretion, refer the bill to the head of such department for investigation and report thereon. The report of such official no doubt greatly aids the President in reaching a decision on the question of approval. If the President approves the bill, he signs it, giving the date, and transmits this information, by messenger, to the Senate. In the case of revenue and tariff bills, which, however, originate in the House, the hour of approval also is indicated. The enrolled bill is delivered to the Secretary of State, who designates it as public or private, depending upon its purpose, and gives it a law number. Public and private laws are numbered serially as to each class for a particular Congress. A copy is sent

to the Government Printing Office, from which the "law print" is made. The enrollment bill itself is placed in the files of the State Department.

In the event the President may not desire affirmatively to approve the bill, and, on the other hand, is unwilling, for what he deems sufficient reasons, to veto it, he may, by not returning it to the Senate within the 10-day period after it is presented to him, permit it to become a law without his approval. The Secretary of State makes a notation on the bill as to the date it was received by the President, and that not having been returned by him to the House in which it originated within the time prescribed by the Constitution, it had become a law without his approval. But if the Congress should adjourn prior to the expiration of the 10-day limit, it fails to become a law. This is what is known as a "pocket veto." The Supreme Court of the United States, in *Edwards v. United States*, 286 U. S. 482, 76 L. ed. 1239, 52 S. Ct. 627, decided that where the 10-day period extends beyond the date of the final adjournment of a session of Congress, including the final session, the President may, within such time, approve and sign a bill, which thereby becomes a law.

If the President opposes the bill, he can veto it; that is to say, he may return it to the Senate without his approval. The procedure on a vetoed bill is prescribed by article 1, section 7, paragraph 2, of the Constitution, which reads, in part, as follows:

If he approve he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the Journal of each House, respectively.

The constitutional provision for reconsideration by the Senate is met, under the precedents, by the reading of the veto message and the adoption of a motion, either referring it, with the accompanying bill, to a committee, or ordering that it lie on the table, to be later considered. If no further action is taken, or if, upon reconsideration, it fails to receive the necessary two-thirds vote, the bill fails. The Senate notifies the House of its failure to pass a Senate bill over the Presidential veto. If, upon reconsideration, it is duly passed by a two-thirds vote of each House, as above provided, endorsements to this effect are made upon the enrolled bill by the Secretary of the Senate and the Clerk of the House of Representatives, respectively. The

bill is not again presented to the President, but is delivered by the Clerk of the House to the Secretary of State. In addition to the steps taken in the case of a bill approved, it is printed with the endorsements of the Secretary of the Senate and the Clerk of the House attesting its passage over the veto of the President.

Note: For the enactment of *constitutional* as distinguished from *statutory* law:

(a) Congress, by a two-thirds vote of both houses may propose amendments to the Constitution; (b) on the application of the Legislatures of two thirds of the States, Congress must call a convention for proposing amendments. Amendments proposed by either method become a part of the Constitution when ratified by the Legislatures of three-fourths of the States, or by conventions in three-fourths of the States—Congress directing which mode of ratification is to be followed (U. S. Const., Art. V).

THE PARLIAMENTARY TACTICS

The rules of procedure adopted by legislative bodies for the conduct of their business make possible a myriad number of parliamentary maneuvers, the exercise of which may block or expedite legislative measures. A knowledge of these rules of procedure is, in effect, a knowledge of the key points at which legislative power may be withheld or channeled to desired ends. They are just as much the stock-in-trade of the lawyer who represents his client in the legislative arena as the rules of procedure are to the lawyer who represents his client in the courtroom. The legislative lawyer, like the courtroom lawyer, must know intimately the intricacies of the power mechanism before which he practices, and, like the courtroom lawyer, is concerned with winning from that power mechanism the given objectives of his client. Let us see just how this part of the legislative power mechanism operates and to what it legitimately will respond.

The rules of the House and the Senate made pursuant to the constitutional provision that "each House may determine the rules of its proceeding * * *" (Const. Art. 1, Sec. 5, Par. 1) have grown to considerable proportions. The Rules of the House of Representatives of the 80th Congress number approximately 175 pages; and Jefferson's Manual of Parliamentary Practice,³¹ upon which many parliamentary rulings are based, is also of considerable size. And these are exclusive of the rulings of the Speakers and the chairmen of Committees of the Whole,³²

³¹ Both of the Rules for the 80th Congress and the Manual are contained in H. Doc. No. 769, 80th Cong. 1st Sess. (1947).

³² There are, for example, 8 volumes of parliamentary precedents of the House of Representatives, prepared by Asher C. Hinds in 1899, and a 3-volume supplement edited by Clarence Cannon in 1935.

which are to the rules of the House what judicial decisions are to statutes. On the Senate side, the Standing Rules of the Senate, the Non-statutory Standing Orders and Resolutions Affecting the Business of the Senate, Cleaves' Manual on Conferences and Conference Reports, and Jefferson's Manual, among others,³³ also provide a formidable array of materials for those seeking to understand this part of the legislative power mechanism. In view of this, it is obvious that no more than an introduction to the subject may be hoped for in this present course of study. The following problems, many of which have been forged from the actual heat of legislative battle over the Food, Drug, & Cosmetic Act of 1938, may, however, be helpful as springboards for a fuller discussion of the *power* aspects of legislative rules, and for focusing attention on the need for inquiring into their nature and methods of operation. Moreover, resort to the House and Senate Rules, Jefferson's Manual, etc., for the solution of these problems should aid in striking up an acquaintance with a body of source materials too important as instruments of power for a competent legislative lawyer to ignore.

Problems: (Apply the current Rules.)

1. After being introduced by Senator Copeland, S. 5 (the bill which became the Federal Food, Drug, & Cosmetic Act of 1938) was referred to the Senate Committee on Commerce after the second reading. (81 Cong. Rec. 65, Jan. 6, 1937). If you had been counseling the sponsors of S. 5, and were apprehensive over the treatment that the Senate Committee on Commerce might give to the bill, what would you have suggested as the best method, if any, under the Senate Rules, for having it shifted to a more favorable committee? What would you have suggested be done if the bill had been referred to a similar committee in the House?

2. After a long series of amendments to S. 5, which were adopted on the Senate floor, the following motion was made:

"Mr. [Senator] Clark: I move to recommit the bill to the Committee on Commerce with instructions to report it back on or before * * *" (79 Cong. Rec. 5231, April 8, 1935)

If you had been keeping your client posted on the effects of the parliamentary maneuvering over S. 5, what would you have advised as to the effect of Senator Clark's move? Could you have suggested any way for counteracting it?

3. On June 10, 1938, the conference report on S. 5 was submitted to the Senate for final action. In discussing the changes

³³ The Senate Rules, Orders, etc., for the 80th Congress, are contained in Sen. Doc. No. 11, 80th Cong. 1st Sess. (1947).

which had been made in S. 5 in the Conference Committee, the following discussion took place:

“Mr. Overton: May I inquire of the Senator from New York what was done with reference to the provision with regard to the labeling of whiskey made out of certain grain products?

Mr. Copeland: I told the House conferees that some of the most able filibusterers in the Senate were so opposed to the amendment that we could not accept it, and it was stricken from the bill.

Mr. Overton: Let me make the observation that the Senator from New York gave correct information to the House conferees.”

In the event the House conferees insisted upon their amendment and the Senate conferees withdrew their objection, what would you have suggested be done under the rules if a filibuster actually got under way?

Suppose that the withdrawal of the objections by the Senate Conferees was contrary to the instructions of the Senate? Would this have made the bill, as amended in the Conference Committee, vulnerable to attack?

4. S. 1944, and S. 2000 (which superseded S. 1944) were both introduced in the 73rd Congress, and after being referred to the Committee on Commerce, “died” in that Committee.

As counsel for the proponents of those measures, what would you have suggested be done under the Rules of the Senate to force the legislation out of committee, so that action could have been taken on the Senate floor?

Suppose the bill was “pigeon-holed” in a House Committee. What would you have advised?

5. On May 16, 1934, a motion was made in the Senate to proceed to the consideration of S. 2800 (one of the bills which antedated S. 5). In connection with the motion, the following request was made:

“Senator Copeland: Mr. President: I think we ought to know what the attitude of Senators is on a measure so important to the public health, and I ask for the yeas and nays.” (78th Cong. Rec. 8956, May 16, 1934.)

A “yea” and “nay” vote on a measure may put those who are reluctant to make public their views “on the spot” with their constituents. It may also make known to the proponents or opponents of a measure just who needs to be subjected to the powers of persuasion. Could the request of Senator Copeland have been defeated under the Rules?

6. On May 31, 1938, Representative Towey obtained leave to extend his remarks on S. 5 in the Congressional Record. Included in his remarks was a short article appearing in Current History magazine. (83 Cong. Rec. 10304-6, May 31, 1938.)

Assume that the article in Current History contained propaganda deleterious to S.5, and that the backers of the bill wished to prevent such literature from being given such free publicity. What, if anything, might have been done under the Rules? Could anything have been done to prevent the article from being mailed out in virtually unlimited quantities under Representative Towey's frank?

7. S. 2800 was introduced in the 73rd Congress, 2d Session, and referred to the Senate Committee on Commerce. The bill was reported out of committee favorably on March 15th, 1934, but was not brought up on the floor of the Senate for final action until July 13th immediately before adjournment. It was thus passed over and died on the calendar. (78 Cong. Rec. 11312, June 13, 1934.)

If you were at the time asked what could be done under the Senate Rules to make sure that S. 2800 would be brought up for final action in time for a full consideration of the measure on its merits, what would you have suggested? What would you have recommended if the problem arose in the House?

8. On April 8, 1935, S.5 was debated in the Senate and various amendments were voted on. When the vote was called for on an amendment offered by Senator Bailey, who opposed the measure, Senator Copeland at first voted against the amendment; later, however, he asked that his vote be changed to a "yea." The amendment was agreed to. Later, Senator Copeland gave the following as his reason for changing his vote:

"I changed my vote from 'nay' to 'yea' on the amendment of the Senator from North Carolina, [Mr. Bailey], so that at the proper time I might move a reconsideration of the action just taken on that amendment, because I am convinced that the full import of that action is not realized." (79 Cong. Rec. 5231, April 8, 1935.)

In terms of promoting the proposed measure, what did the move by Senator Copeland accomplish?

9. On May 28, 1935, S.5 was further debated in the Senate, at which time forty-nine amendments were voted on. (79 Cong. Rec. 8341, 8350-56, May 28, 1935.)

Is there any limit in the Senate to the number of amendments which might be introduced to a proposal if it was disclosed that they were being introduced for dilatory purposes only? What, if anything could be done under the Senate Rules to limit their number? What, if anything, could be done to prevent such a dilatory tactic in the House?

10. On April 3, 1935, during the discussion of S. 5, two quorum calls were asked for and carried out within a few minutes' time—presumably to delay the measure. (79 Cong. Rec. 4911, April 3, 1935.)

Is there any limit on the number of quorum calls which may be asked for in the Senate? In the House?

11. Suppose that a proponent of S.5 requested the Rules Committee of the House to issue a special resolution to bring S.5 up on the floor for immediate consideration; and that this request was refused. Suppose that he then endeavored to accomplish this objective by making a motion on the floor to suspend the rules for the regular order of business, but that the Speaker, an opponent of S.5, repeatedly refused to recognize the member making the motion. What, if anything, could have been done under the rules of the House to circumvent the action of the Rules Committee and the Speaker?

(b) On the State and Local Levels

On the state and local levels of legislative activity there are also formal machinery and rules of procedure with which the legislative lawyer must strike up an acquaintance if he ever should be called upon to advise on the strategy for blocking a piece of legislation or for advancing it through passage. Obviously, it is not feasible here to describe the machinery or to concoct problems involving the procedure of legislative bodies in all of the various state and local jurisdictions. What has been singled out, therefore, in the following materials are the machinery and the procedures for state law-making in Nebraska—not with the thought that they are “typical”, but rather (1. to indicate the general pattern of information the lawyer must seek if he is concerned with law-making on the state and local levels; and (2. to suggest what teachers elsewhere might make available to students of legislation intending to practice in other jurisdictions.

THE FORMAL MACHINERY

ROBERT A. BARLOW, JR., OUTLINE OF THE STAGES FOR THE ENACTMENT OF A LAW BY THE NEBRASKA UNICAMERAL LEGISLATURE

Normally, the course followed by a bill³⁴ in its journey through the Nebraska Unicameral Legislature is as follows:

1. Introduction and first reading.
2. Reference to standing or select committee.
3. Consideration by standing or select committee.

³⁴ Presumably, the enactment of a law by resolution instead of by bill is precluded in Nebraska. Const., Art. III, § 13.

4. Report by standing or select committee and reference to General File.

5. General File: reading, consideration and general debate by the Legislature.

6. Reference to Enrollment and Review Committee.

7. Report by chairman of Enrollment and Review Committee and reference to Select File.

8. Select File: consideration a second time by Legislature.

9. Advancement to Enrollment and Review Committee for engrossment.

10. Report by chairman of Enrollment and Review Committee and reference to Final Reading File.

11. Consideration on final reading and passage.

12. Transmission to Governor.

13. Approval or disapproval by Governor.

14. If disapproval by Governor, bill returned to Legislature; opportunity for over-riding of Governor's veto.

Any member of the Legislature, or any standing committee may introduce one or more bills.³⁵ Each bill must be read by title upon introduction.³⁶ No bill, however, may be introduced after the twentieth legislative day, except (a) upon recommendation by the Governor, or (b) by a standing committee, if so permitted by a majority of the elected members of the Legislature.³⁷

Following introduction, the bill is assigned by the Reference Committee to a standing committee or a select committee. Any member, however, may object to the reference, "and correction in case of an error in reference" may be made by unanimous consent of the Legislature, or by the vote of a majority of the elected members.³⁸ The bill is then considered by the committee to which it was assigned. Before the committee may take final action, however, it must hold a public hearing, giving notice by publication in the Legislative Journal of the date and time of the hearing at least five calendar days before it is to be held.³⁹

The standing committee is authorized to combine related subjects which are contained in different bills referred to it, as well as adopt amendments to the bill for the consideration of the Legislature.⁴⁰ But, whether with or without amendments, the standing committee must, by vote of a majority of its members,

³⁵ Rule 11, § 1, Rules of the Nebraska Legislature (1947), (Hereinafter cited as "Rules").

³⁶ Nebr. Const., Art. III, § 14.

³⁷ Rule 11, § 3.

³⁸ Rule 14, § 3.

³⁹ Rule 6, § 3.

⁴⁰ Rule 6, § 4.

either recommend that the bill (a) be placed on General File for consideration, or (b) be indefinitely postponed.⁴¹ If the recommendation be to postpone indefinitely, the bill may nevertheless be placed on General File or referred back to the standing committee either (a) by a majority vote of the Legislature upon motion made within three legislative days after the committee submits its report, or (b) by a two-thirds vote made more than three days after the committee report.⁴²

When a bill is either reported out of committee or taken out of committee by the Legislature, it takes its place at the bottom of the General File. After the twenty-first legislative day, however, the Committee on Order and Arrangement, reports to the Legislature, for approval by majority vote, the order in which bills are to be considered on General File.⁴³

On General File, the bill is considered for the first time, and the amendments, if any, recommended by the committee are first considered for adoption or rejection, after which each section of the bill as read is open to amendment from the floor.⁴⁴ Following the adoption of amendments, unless the bill is indefinitely postponed or recommitted to a standing committee, it is advanced to the Enrollment and Review Committee for recommendations relative to arrangement, phraseology and correlation.⁴⁵

The bill is next placed on Select File for consideration a second time, but it may not be considered by the Legislature until three legislative days have elapsed since the advancement of the bill to the Enrollment and Review Committee.⁴⁶ At this stage the changes recommended by the Enrollment and Review Committee are approved or rejected. Moreover, the bill may be (a) amended further by unanimous consent or by majority vote after being recommitted to the General File for specific amendments; or (b) recommitted to the standing committee.⁴⁷ If, however, the bill is not amended, indefinitely postponed, or recommitted to the standing committee, it is returned to the Enrollment and Review Committee for engrossment.⁴⁸

Following engrossment, the bill is placed on Final Reading File, and if five legislative days have elapsed since its initial reference to the Enrollment and Review Committee, and two legislative days have elapsed since its reference to the Final Reading File, the bill is read at large with all amendments for

⁴¹ Rule 6, § 8.

⁴² Rule 6, § 9.

⁴³ Rule 5, § 9.

⁴⁴ Rule 12, § 5a.

⁴⁵ Rule 12, § 6.

⁴⁶ Rule 12, § 8.

⁴⁷ Rule 12, §§8a, 8b, 8c.

⁴⁸ Rule 12, § 9.

final consideration.⁴⁹ Before the roll call has begun on final reading, however, the bill may be recommitted to (a) the Enrollment and Review Committee to correct an error, (b) the standing committee, or (c) the Select File for specific amendments.⁵⁰ If not recommitted, it is voted on.

If the bill contains an emergency clause providing that it take effect upon passage by the Legislature and approval of the Governor, it requires a two-thirds majority vote for passage.⁵¹ A bill containing an emergency clause, however, which does not receive this two-thirds majority, is submitted for vote without the clause, and, as in the case of non-emergency clause bills, if passed by majority vote and signed by the Governor, it becomes a law three calendar months after the adjournment of the session.⁵²

Following passage of the bill, the Lieutenant Governor, or the Speaker if acting as presiding officer, must sign the bill in the presence of the Legislature and while it is in session.⁵³

The bill is then transmitted to the Governor for approval or disapproval. If he approves, he signs it, but if he disapproves, he returns it to the Legislature with his objection. Upon the day of receipt of the message from the Governor announcing his veto of the bill or on one of the next five legislative days, any member may move that the bill be taken up, and if approved by three-fifths of the elected members, it is passed, notwithstanding the objections of the Governor.⁵⁴ Further, any bill which is not returned by the Governor within five days (Sundays excepted) after it is presented to him becomes law, as if he had signed it, unless the Legislature by adjournment prevents its return. In the latter case it becomes a law as if the Governor had signed it unless he files the bill with his objections in the office of the Secretary of State within five days after the adjournment.⁵⁵

Note: In addition to the enactment of statute law by the legislature under the foregoing procedure, it is possible for electors in the state to enact laws by the process of the initiative and to suspend and repeal laws by the process of the referendum. See Neb. Const., Art. III, §§ 1-4. For the procedures involved in the enactment of constitutional law, see Neb. Const., Art. III, § 4; Art. XVI, §§ 1-2.

⁴⁹ Rule 12, § 11.

⁵⁰ Rule 12, § 12.

⁵¹ Nebr. Const., Art. III, § 27.

⁵² Nebr. Const., Art. III, § 27, Rule 12, § 14.

⁵³ Nebr. Const., Art. III, § 14.

⁵⁴ Rule 12, § 15.

⁵⁵ Nebr. Const., Art. IV, § 15.

THE PARLIAMENTARY TACTICS

Inasmuch as Nebraska operates under a unicameral system, only one rather than the usual two sets of rules of procedure need be consulted. Let us see what some of them involve, and how much power they wield in the following situations:

Problems: (Apply the current "Rules of the Nebraska Legislature.")

1. The Sixtieth Session of the Nebraska Unicameral Legislature was in the ninety-seventh legislative day (Friday, May 23, 1947), contemplating final adjournment at the end of the following week. Following the noon recess, while the body was considering bills on final reading, this message from the Governor was received and read to the members:⁵⁶

May 23, 1947

The President, the Speaker and
Members of the Legislature

Gentlemen:

* * *

Your Honorable Body has already enacted several constructive measures which should assist in bringing about a more nearly equitable assessment of property. For this you are to be commended. I feel, however, that we have not done enough to insure the return to the assessment rolls of an appreciable portion of "the lost billion" which disappeared therefrom between 1929 and 1946.

* * *

As one means of securing a more complete and equitable assessment of personal property, I recommend for your consideration a bill which I have had drawn and ask be introduced, providing that it shall be mandatory for the assessor in each county to publish for one insertion the personal assessment roll of each voting precinct in some newspaper or newspapers of general circulation therein. I appreciate that this is a drastic measure but in my opinion the situation requires it. The law now provides that county boards may do this at their discretion and over the years such has been done in some instances. Experience has shown that it brings about an appreciable betterment of the assessment of personal property. Such a measure would take advantage of the world's greatest force—public opinion. No legal power can match its persuasiveness.

* * *

You have labored long and hard with some of the most trying problems that have faced any session of our legislature. Being fully cognizant of this fact, I hesitate to impose any new burdens upon you this late in the session. However,

⁵⁶ Nebr. Legislative Journal, 60th Sess. (1947) 1602.

our responsibility to the people requires that we do everything possible to insure the highest degree of efficiency and effectiveness in the assessment of property, which is, of course, basic in our system of taxation.

Respectfully submitted,
(Signed) Val Peterson,
Governor."

Assume that you had been engaged as counsel for Taxpayer's League and had drafted the bill (L. B. 568) mentioned in the Governor's message. If the Governor had refused to recommend its introduction, what steps would you have advised to effectuate its introduction?

2. Following the reading of the Governor's message, Mr. Mueller asked unanimous consent to suspend the rules in order to introduce the bill in question. Why was this move necessary?

Objection was offered and unanimous consent, accordingly, was not granted. What course of action would you have advised to counteract this denial of consent?

3. Those who originally objected to the introduction of the bill withdrew their objections, and unanimous consent was finally given on the same day. L. B. 568 was thereupon introduced and immediately thereafter the following motion was made by Mr. Metzger:

"Mr. President: I move to suspend the rules and place L. B. 568 on General File."

What would have been the effect upon the progress of the bill if this motion had passed?

4. Mr. Metzger's motion failed. A motion, however, to "suspend the rules and refer L. B. 568 today" prevailed, and the bill was referred to the Revenue Committee. A motion to re-refer to the Government Committee was then made and passed. If reference to the Revenue Committee had been preferred, what course of action, if any, would you have advised?

5. Suppose that, while the motion to "suspend the rules and refer L. B. 568 today" was pending, the opponents of the bill made a motion to adjourn which was defeated, and that they followed this defeat with a motion to recess. What could have been done to block this second motion and force a vote on the previous question of reference?

6. Following re-reference to the Government Committee a motion was passed to suspend the rules and set L. B. 568 for public hearing on Monday, May 26, 1947, at 4:00 p.m. The following motion was then made by Mr. Carmody:

"Mr. President: I move that all bills in Standing Committee which hold regular public hearings be indefinitely postponed."

What move would you have recommended to counteract this motion?

7. Assuming that the motion above had prevailed, what would you have advised be done?

8. Following the disposition of Mr. Carmody's motion, a motion was made to adjourn until 9:00 a.m., Saturday morning. Assuming that tentative plans had been made for final adjournment on Thursday, May 29, 1947, what effect would the adoption of such a motion have on L. B. 568?

9. On Tuesday, May 27, 1947 (ninety-ninth legislative day) following the public hearing, the Government Committee reported L. B. 568 out of Committee, and it was placed on General File. What course of action would you have advised if the Committee had refused to report the bill out on that day?

10. On the same day that L. B. 568 was placed on General File standing committee amendments were adopted, and the bill was advanced to the Enrollment and Review Committee. The following day (May 28, 1947) it was placed on Select File. A motion made to advance the bill was defeated. Thereafter a motion to postpone L. B. 568 indefinitely was passed by a vote of 21 to 20, with two not voting. Considering the motion's narrow margin of passage, what further course of action, if any, would have been possible?

11. Assume that the motion to postpone indefinitely had been defeated, and that the opponents of the measure immediately made a second motion to postpone indefinitely. What could have been done to block this second motion?

12. Assume that the motion to postpone indefinitely had been defeated but that instead of making a second motion to postpone indefinitely the opponents immediately prevailed upon one of the Senators who had not voted to move a reconsideration of the vote. What, if anything, could be done to counteract such a move?

13. Assume that L. B. 568 had been given a final reading, and that the roll call was under way to ascertain the vote on the measure. Could the voting have been held up by a motion to adjourn?

14. What if instead of a motion to adjourn in the problem above, a motion to pass over L. B. 568 had been made?

15. Suppose that L. B. 568 had undergone a final reading, but before the roll call was under way (1) a Senator made a motion to recommit the bill to the standing committee without instructions, (2) he spoke in favor of his motion briefly, (3) his opponents then spoke against it, and (4) the Senator, in his reply, commenced a filibuster. What would you have advised as a means of stopping it?

16. Assume that L. B. 568 was passed on final reading and that, while the Legislature was in session and capable of transacting business, the President of the Legislature signed the bill. Could a motion to reconsider have thereafter been entertained?

IV

THE LOCUS OF LEGISLATIVE POWER

INTRODUCTORY NOTE

The foregoing materials on the mechanics of law-making deal with the problem of what the legislative machinery is, and what it can do. There is still the question of who has the control over the machinery. To the operating lawyer the "who has control" problem is crucial, for granted that he knows how many and what kind of wheels there are in the legislative machinery, he must make sure that those who have the power to turn these wheels propel them in the proper direction.

In a representative government, those who have the real as distinguished from the ostensible control of legislative power are, obviously, the represented, and not the representatives. It is common to lump the former into an amorphous symbol called the "people," but there are those who maintain (1) that the "people" are, in reality, no more than a composite of diverse and competing functional and economic groups seeking political expression for diverse and competing interests, and (2) that in a democracy where these interests compete for the control of political power, obviously only the victorious of these interests are really the "represented." If this is true, to locate the leaders of these successful functional and economic groups is to locate the "who" of ultimate legislative power at any given time. It is they who form the matrix of the "invisible" arm of legislative government.

On the more "visible" side, however, one must look to the political party leadership of the party which has captured the majority of the seats in the legislative body. This is especially true, of course, in times when the party is composed of cohesive elements, i. e., when the members of the party in the legislature abide by the decisions of the political party hierarchy. When such cohesiveness exists, the cogs of the political machinery are of importance to the operating lawyer, if for no other reason than to know the location and to gauge the relative power of the points of control. On the Congressional level, the nature of these points of control has been the subject of considerable study and analysis. Of particular value are the following observations on the subject by a distinguished student of legislative processes. Though written in 1936, they still, by and large, conform to present-day realities:

JOSEPH P. CHAMBERLAIN, LEGISLATIVE PROCESSES,⁵⁷
308-316 (1936)⁵⁸

* * *

PARTY ORGANIZATION IN CONGRESS

* * * As soon as the Congress assembles, meetings of the two parties are called in each house to prepare the party slate for the session. In the Senate, which is a continuing body, the leader of each party invites the senators of his party to a conference for the organization of the party. The vice-president is the Senate's constitutional presiding officer, but the conference nominates the candidates for president *pro tem*, and it may happen that the vice-president is of a different party than that having the majority in the Senate, so that he and the president *pro tem* may be of different political faiths. The conference selects the party candidates for the officers of the Senate, and it is in these conferences that membership on the Senate committees is fixed. The conference elects its chairman—who is at the same time the floor leader—the assistant leader, and a secretary. It also provides for either the election or appointment of the whip. The Democratic conference customarily elects, and the Republican authorizes the chairman to appoint, the whip. The conference also controls the nominations for the committees of the conference, the most important of which are the steering committee or the committee on the order of business, the committee on committees, and the committee on patronage which divides up the small amount of general patronage at the disposal of the Senate. The committee on committees makes the nominations for membership on the standing committees, though the final decision is made by the conference itself. The lists as made up by the conference are presented to the Senate which, under the rules, elects the committees, but the election is merely a formal confirmation of the action of the party conferences.

The steering committee meets from time to time to determine the legislative program and pass on the priority of pending legislation. If the same party controls both houses, the steering committee acts "more or less in conjunction with a like committee of the House."⁵⁹

The Republican conference first elects a chairman who becomes thereby the party leader. The conference also elects an assistant chairman and a secretary.

In the House the parties follow a similar process. The party meeting first elects its chairman, vice-chairman, and secretary.

⁵⁷ The selected footnotes have been renumbered.

⁵⁸ Reprinted with the permission of Appleton-Century-Crofts, Inc. Copyright, 1936, by D. Appleton-Century Company, Inc.

⁵⁹ William Tyler Page, "The Machinery of Legislation," Cong. Record, 70th Cong., 1st Sess., p. 3652.

The majority selects its candidate for speaker, who is certain to be elected, and the minority decides on the member to whom it will give a complimentary vote as its choice. * * *

* * *

The system of selecting members of the standing committees in the House differs in the two parties. For the Republicans, the committee places are filled by a committee on committees which consists of one member from each state having a Republican delegation in the House. The members are elected by the Republican meeting, but its choice always falls on the person nominated by the state delegation. Some of the states having small Republican representation choose their representatives by a system of rotation, but the general practice is to pick out an influential man and keep him on the committee, since the longer he has served and the wider his acquaintance the greater will be his power to secure good committee assignments for members from his state. The leader is chairman ex-officio of the committee, but without vote, unless he is the delegate from his state, which in practice is usually the case. In the committee, each member casts as many votes as there are Republicans in the House from his state. All action taken by the committee is reported to the Republican caucus and must be approved by it, but, as a practical matter, its recommendations are usually endorsed by the party meeting and presented to the House as the Republican nominations for committee assignments.

After the committee on committees has filled up all the Republican vacancies on the important standing committees, it is the practice for it to appoint a subcommittee of five or six to which it entrusts the laborious task of parceling out among the remaining Republican members the vacancies on the minor committees. The action of the subcommittee is usually adopted by the full committee and in turn by the caucus. * * *

The Democrats have not adopted the device of a committee on committees, but the Democratic members of the ways and means committee, who are selected by the caucus, serve the same purpose for their party, making all committee assignments of Democratic members. The action of this committee must be reported to and approved by the party meeting, but the uniform practice is for the meeting to endorse its recommendations. The membership of the principal standing committees is so proportioned between the majority and minority that the majority is sure of a working majority on the committees. These committees are rules, ways and means, appropriations, agriculture and forestry, interstate and foreign commerce, judiciary, and rivers and harbors. * * *

PARTY ACTION IN THE HOUSE

When the organization of the House is completed, each party not only has its representation on the standing committees, but has also party machinery through which it is able to express the party will, so far as there is a party will, on any measure of legislation. The supreme party organ is the caucus or conference, and, when the majority caucus or conference has taken a position in favor of a particular measure, it can be brought out on the floor by the working of the party machinery under a rule which will insure it prompt attention. The leaders, however, do not frequently assemble the party members in a meeting to determine action upon a bill, partly because strictly party measures are rare in any but emergency Congresses, and partly because there is apt to be a sufficient difference of opinion in the party, so that it will not be easy to secure agreement in the conference on the action which the party should take. In order to bind the members, however, they must meet in a caucus, and in the Democratic caucus a vote of two-thirds is needed to bind the members present, provided that the two-thirds is more than a majority of the total Democratic membership of the House. Even then, members may be excused by showing that the recommendation of the caucus is contrary to their election pledges.

For reasons that have already been explained, the party is not apt to be a unit on many questions, and it may be very difficult to get a binding vote at a caucus. In fact, a Democratic caucus held at the beginning of the special session in 1933, when President Roosevelt was at the height of his power, very nearly committed the party to a vote against the Economy Bill which he recommended and thus foreshadowed the defeat which he later sustained in his attempt to continue the reduction of the payments to veterans and the salaries of government employees. Where, however, the party leaders are confirmed in taking a certain position on a bill by a favoring vote in a caucus or conference, they will be in a strong position to use the machinery of the House in order to get a measure passed quickly.

The Consent Calendar, the call of committees on Calendar Wednesday and the Private Calendar are called automatically, and thus escape control of the party machinery, but the bills which are acted upon in this manner will rarely if ever be measures of political importance. Only on the call of committees can a measure of importance be brought before the House, and, as the chairmen of the committees are all selected by the majority party, the leaders can bring influence to bear upon them, either to bring up or not to bring up a particular bill. If, indeed, the leaders fear that a measure to which they are opposed may come up under the call of committees, they can secure an adjournment

of the House on the Wednesday on which the suspected committee is to have its turn. A means provided for the purpose of overthrowing the party machinery is the motion for discharge of a standing committee. If that rule is workable, a large group of members may force a vote contrary to the desire of the House leaders.

The position of the dominant party throughout the procedure of the House is clearly marked. The speaker is chosen by the party meeting. He maintains his position as a party leader and is an instrument of the party in putting through its program of legislation. As the presiding officer, he represents the whole House and owes to it the duty of being fair to individuals and protecting the rules, a duty which most speakers have faithfully observed; but through his power of recognition and his rulings, he can be of use in advancing his party's legislative program. He is looked upon as one of the leaders of his party and is consulted as a leader, so that, by assuming the office of speaker, he is not expected to give up his place as a party leader and become solely an impartial arbiter of procedure. While the speaker has been stripped of many of the powers which formerly gave him a wide control over the action of the House, he is still of importance in the party machine.

The party also controls the chairman and the majority of each of the standing committees and may, therefore, be held responsible for the bills which the committee reports out. When a bill comes from the committee, it is managed on the floor either by the chairman or another member of the majority party appointed by him. It is normally the chairman of the committee also who goes to the committee on rules to secure a special order, and, in the committee on rules, he finds a majority and the chairman of his own party in close relationship with the steering committee, the House leader, and the speaker, as the authority to decide whether or not he is to receive the coveted permission to bring up his bill.⁶⁰ The rules committee fixes also the terms of the special order and may limit debate or cut off all amendment. Finally, it is the chairman of the committee on rules who moves in the House that the special order be adopted, and, as has been shown, he can be dilatory in this duty. In most cases, his action will be governed by the will of the party steering committee or party leaders.

If a measure is to come up under suspension of the rules, the speaker must decide whether he will recognize the proposer of a motion to suspend, so that here again the party machinery may work to prevent a measure coming out against the will of the leaders. With the two-thirds majority required for sus-

⁶⁰ Robert Luce, *Legislative Procedure*, p. 201.

pension, it would be a very unusual case in which a party measure could be put through by this method, and the party leaders have at their command the much more convenient method of a special order; but, it may be equally important to prevent a bill coming out on the floor under suspension, and this the party machinery is able to do.

PARTY CONTROL OF TIME OF THE HOUSE

The position of the party machinery in managing the time schedule of the House is well recognized, and it is from the majority leader that the House learns what program is to be laid before it. The real center of control in the House may be in the speaker, the majority leader and the chairman of rules, or it may be in the steering committee. As the speaker is of the same party as the majority of the House, it will be easy for him to consult with the other leaders in respect to the party program, and it is also convenient for the group of three to urge upon chairmen of the standing committees the importance, from a party point of view, of action or non-action on a bill before a committee and the character of the amendments to be made to it.

Where the party is well united and has confidence in its leaders, they will be the guiding force, but where there are wide differences of opinion, the steering committee, composed as it is of representatives from all sections of the country, may have a greater degree of influence. In any case, the decision must be carried out through the speaker, the floor leader, and the rules committee, whose chairman will be its leading member, so that these three will have a great influence on the time table of the House. They must have had long experience in the rules and customs of the House. The leader especially must understand how business is done and must have demonstrated his ability to manage his party as well as the House. As members are apt to grow cautious with long service, the control of both the majority and minority parties will normally be vested in members whose inclination will be to examine very critically any novel proposal of legislation.

Since there are only few strictly party measures which come up at a session, the task of the leaders is, in a normal session, not so much to push the party program as to arrange a schedule of bills which will be satisfactory to the majority of their party and to the majority of the House. It is for them to prevent measures on which the House does not desire to vote from coming before it and to give right of way to bills for which there is a strong demand. They cannot act arbitrarily, for their position, after all, depends upon their party fellows and they must, on the whole, express the desires of the members sufficiently well to secure their own reelection. The defeat of the 1932 revenue

bill is a striking example of the power of a rebellious majority when it is ably led and feels itself backed by public sentiment. The House leaders may, in a particular instance, prevent the success of a revolt by insisting on a strict rule limiting debate and amendment, but, if the majority against their measure is sufficiently determined and well led, it can vote down the rule and force the leaders to open their measure to amendment and debate on the floor.

THE MINORITY PARTY

The minority party is also well organized to present its point of view whenever it has one. It is equipped with a large minority membership on each of the committees and with its own party machinery. When a measure comes out on the floor, the opposition is normally directed by the leading minority member, who has been trained by the hearings and discussion in the committee. He is, therefore, informed as to the weaknesses and the strength in the arguments for the bill and knows in advance what those arguments will be. If his party desires, his experience in the committee will make it easy for him, with the aid of his fellow members, to prepare the amendments which are the real bane of the member in charge of the measure on the floor. If there be a sharp party division, therefore, the party organization in the Senate and House has ample means of making clear to the public its position during hearings in the committee, the debate and the voting on the floor.

PARTY ACTION IN THE SENATE

The lack of an organized control of procedure in the Senate and the difference in the customs of that body, as compared with those of the House, make party control far less complete. There are party steering committees and party leaders, and the same possibility of a party conference, but the power of individual senators to delay action makes the carrying out of a program far more difficult. The right of any senator to introduce amendments, to request a vote and to delay action by debate makes it hard to enforce party discipline in that body. The majority leader is the mouthpiece of his party, as the minority leader speaks for the minority. If he does not want a measure to be debated or voted on, he may ask that it be put over, and, as he can usually prevent action if he chooses to do so, a member will generally yield, unless the motion is a move in a filibuster. Not infrequently, the majority leader will say that he has an agreement with the minority leader that the measure should not come up on a particular day, or that several senators who are interested have gone away on the promise that the bill will be held until their return. He cannot be arbitrary in a chamber where everyone is jealous of his rights and where compromise and

mutual arrangement are the day to day routine. Lacking a strong centralized authority, the Senate must rely largely on senatorial courtesy to grease the wheels of its simple machinery.

DIFFICULTIES OF PARTY CONTROL

The political task of a party machine in Congress is to keep harmony in its own party and to prevent the formation of a majority opposed to its program. Such a majority can be formed only if there is a revolt within the majority party, but such revolts are certain to occur if the machine tries to force votes contrary to the settled convictions or local political interests of members. The leaders must, therefore, weigh their decisions carefully, and they cannot always block measures to which they may be opposed. Consequently, bowing before a determined majority, the leaders often allow measures of which they do not approve to come out on the floor. For example, the McNary-Haugen bill was opposed bitterly by the President and by the leaders of both parties, but it was favorably reported by the committee, received a special order and was passed.

Party control of measures in Congress is complicated by the fact that a different party may control each of the two houses and, also, by the consideration that the president is an important factor in legislation as in party affairs. Thus party leaders in either house are faced with the necessity of considering what may happen in the other house and of reconciling the views of the president with the views of their own party members. Even where the same party controls both houses and has put its candidate into the White House, sharp differences of opinion will arise and render the task of party leadership far more difficult than in countries where there is one controlling house. Cases have even happened in which a president had to rely on the opposition party. Theodore Roosevelt was vigorously opposed by Speaker Cannon and the Republican House machine, and President Wilson, at the beginning of the World War, was forced to depend on the Republicans in the committee on military affairs to get the Selective Draft Bill out on the floor. President Coolidge opposed the Republican majority in Congress which put through the McNary-Haugen bill.

The fundamental difficulty with strict party control of legislation lies in the fact that but rarely is there a unified party program to which members are bound. The task of the party machine is less to put through legislation to which the party is committed, than it is to find time to pass the necessary measures for the support of the government, the tax and appropriation bills, the minor bills required for the improvement of government machinery, and then so to arrange the schedule that an opportunity may be given to the measures which are desired by

Congress or which, in agreement with the president, the leaders think should be passed, in order to give their party a good position at the next election. Had it not been for the influence of the party organization, spurred by the President's desire to do something for labor, the Longshoremen's and Harbor Workers' Compensation Act might not have been put through; and it is obvious that the House of Representatives would not have passed the Federal Reserve Bill in the form in which it became law, without strong pressure from President Wilson, and without persuasion that the measure was necessary in the interest of the party.⁶¹

Note: For those who wish to pursue further the problem of the locus of power in Congress, see Galloway, *Congress at the Crossroads* (1946), particularly at 105-122.

For general information as to the locus of legislative power on the state level, see: Bates and Field, *State Government* (rev. ed. 1939); Merriam and Gosnell, *The American Party System* (rev. 1940), Schattschneider, *Party Government* (1941); MacDonald, *American State Government and Administration* (rev. ed. 1945), Graves, *American State Government* (rev. ed. 1946). For more specialized studies, consult whatever literature there may be available in your particular jurisdiction.

⁶¹ See Paul DeWitt Hasbrouck, *Party Government in the House of Representatives*.

CHAPTER 5

PROBLEMS RELATING TO ADMINISTRATIVE LEGISLATION

A. INTRODUCTORY NOTE

In coping with the vast problems of an advanced industrial society, legislative bodies have been faced with an increasing need to delegate a great deal of subordinate legislative power—often referred to as “rule-making” power to administrative bodies. Some of the reasons for this development are “(1) the requirement of greater flexibility in the details of a law than the legislature can supply, in order to meet changing conditions; (2) the need for freeing the legislature from concern with details in the initial consideration of a law because of the pressure of time upon it and the desirability of careful consideration of the fundamental problems involved; (3) the desirability of expert determination of numerous matters involved in modern legislative schemes such as those affecting housing, health, social security, and public services of many sorts; and (4), the necessity of administrative authority to deal with emergencies, for which the legislature often cannot be summoned and with which its processes are too slow to deal even when it is in session.”¹ Take a few illustrations from the history of the Federal Food, Drug, and Cosmetic Act of 1938. Under the 1906 Act, the standards for the quality and identity of food were fixed *ad hoc* by juries; and this was found unsatisfactory because it resulted in uncertainty and lack of uniformity. Congress wanted to tighten the controls against the misbranding of food and other products by prescribing uniform standards of identity and quality. How accomplish this? Could Congress undertake directly by legislation to spell out in detail the standards for the thousands of types of available foods? Suppose it did undertake to do this by legislative enactment, but a few months later new types of food appeared on the market which required standardization. Would it be feasible to set the heavy Congressional machinery in motion every time a new food had to be given a standard of identity and quality, or every time a manufacturer

¹ This is the summarization of Professor Carr's views in his work on Delegated Legislation (1921) which appears in the Report of the Attorney General's Committee on Administrative Procedure (1941), Sen. Doc. No. 8, 77th Cong., 1st Sess., 98, note 17. For an expansion of these reasons see the Report of the Attorney General's Committee on Administrative Procedure, *Ibid* 11-17.

made a convincing argument that, for particular reasons, his product merited an exemption from the statutory requirements? Some idea of what such legislation would entail is suggested by the following examination of just how an administrative agency, the Secretary of Agriculture, actually legislated a standard of quality for just one food product—canned tomatoes, under § 401 of the Federal Food, Drug, and Cosmetic Act of 1938.² Here are the Secretary's "Findings of Fact:"³

1. A standard of quality for canned tomatoes based, as one of the factors to be considered, upon the weight of the tomatoes in the container that are retained, after proper draining for two minutes on a sieve (eight inches in diameter if the quantity of the contents of the container is less than three pounds and twelve inches in diameter if such quantity is three pounds or more) having two meshes to the linear inch and the bottom which is made of wire of a uniform diameter of 0.054 inch, woven into square meshes of a uniform inside diameter of 0.446 inch, equalling or exceeding one-half of the weight of water at 68° F. required to fill the container, is a reasonable one and would promote honesty and fair dealing in the interest of the consumers for the reasons, that the sieve of the size described permits the liquid and very small pieces of tomato flesh to fall through the openings, retaining the larger tomato portions; one-half at least by volume of the can is tomato meats of sufficient size to serve the uses to which consumers make of the article; consumers can determine their needs and make budgetary allowances in purchasing the size can best suited to their needs knowing that not more than one-half is liquid and tomato fragments; and it can be precisely determined.

2. It is reasonable and will promote honesty and fair dealing in the interest of consumers to specify a drained weight requirement for canned tomatoes based on the water capacity of the container rather than a drained weight requirement based on the total contents in the container for the reason that the can, to the consumer's eye, is a measure of the quantity of drained tomato meats that ought to be received; recent examination of thousands of cans of tomatoes show that a requirement based on the water capacity of the container would be fairer and more equitable both to the canner and the consumer; it would give the consumer a better quality of tomatoes; it could

² The functions of the Secretary of Agriculture under the Act were transferred to the Federal Security Administrator by Reorganization Plan No. IV submitted to Congress April 11, 1940, by authority of the Reorganization Act of 1939. The transfer became effective June 30, 1940 by provision of Public Resolution 75, 76th Congress, June 4, 1940.

³ 4 Fed. Reg. 3323 (1939).

be accurately determined; and it is in accord with good commercial canning practice.

3. It is reasonable and it will promote honesty and fair dealing in the interest of consumers to prescribe, in a reasonable standard of quality for canned tomatoes, a method for determining the weight of water required to fill a metal container with lid attached by double seam which will include

(1) opening the container without injuring the double seam, removing contents, washing, drying and weighing the empty container.

(2) filling such container with distilled water of a temperature of 68° F. to three-sixteenths of an inch below the top level and then weighing the container and the water; and

(3) the result, after subtracting the weight of the empty container described in (1) from the weight of the container and water described in (2), is the weight of water required to fill the container, for the reason that the method is definite; that any method based on can dimensions would be approximate; that domestic and imported can construction differs; that calculations from dimensional measurements are not accurate; that three-sixteenths of an inch is the accepted and determined measure of the double seam; that the displacement method is not practicable or reasonable for a canner to use in his factory; and that the method here recommended is in accord with good commercial canning practice.

4. It is reasonable and will promote honesty and fair dealing in the interest of consumers to prescribe, in a reasonable standard of quality for canned tomatoes, a method of determining the weight of water required to fill containers other than those attached by double seam, which will include

(1) opening the container, removing contents, washing, drying and weighing the empty container.

(2) filling such container with distilled water of a temperature of 68° F. to the top and then weighing the container and the water; and

(3) the result, after subtracting the weight of the empty container described in (1) from the weight of the container and water described in (2), is the weight of water required to fill the container, for the reasons that the method is definite; that any method based on can or container dimensions would be approximate; that domestic and imported container construction differs; that calculations from dimensional measurements are not accurate; that when tomatoes are in containers with lids other than those attached by means of a double seam the lid is placed on the top of the container; that the displacement method

is only practicable with good commercial canning practice.

5. A standard of quality for canned tomatoes based, as one of the factors to be considered, upon the redness or height of the color of the tomatoes in the container determined by taking and removing from the sieve the drained tomatoes obtained in determining the drained weight and cutting out and successively segregating those portions in which the red color is least developed until one-half by weight of such drained tomatoes have been so segregated; by reducing such segregated portions to a uniform mixture without removing or breaking the tomato seeds; by putting such mixture into a black container to a depth of at least one inch; by freeing such mixtures from air bubbles and skimming off or pressing below the surface all visible tomato seeds; by comparing the color of such mixture, in full diffused daylight or its equivalent, with the blended color of combinations of the following Munsell color discs, or the color equivalent of such discs:

Disc. 1. Red—5R2.6/13 (glossy finish)

Disc. 2. Yellow—2.5 YR 5/12 (glossy finish)

Disc. 3. Black—N 1/ (glossy finish)

Disc. 4. Grey—N 4/ (mat finish);

and if the redness or height of the color of such mixture is not less than that of any combination of the above-described Munsell color discs in which one-third of the area of disc 1 and not more than one-third of the area of disc 2 (regardless of the exposed area of discs 3 and 4) is exposed, then the color factor requirement is met,

would be reasonable and would promote honesty and fair dealing in the interest of consumers in that the consumer would be assured of getting tomatoes with fairly well developed red color, and would be in accord with good commercial practice.

6. In a standard of quality for canned tomatoes, a maximum allowance of one square inch of tomato peel per pound of canned tomatoes in the container as one of the quality factors would be reasonable and would promote honesty and fair dealing in the interest of consumers in that, of the thousands of cans of tomatoes examined between July 1, 1937 and September 21, 1938 representing the output of 388 packers located in all of the principal tomato producing sections of the United States and being a very representative cross section of the industry, the great majority showed less than one inch of tomato peel per pound of canned tomatoes; the consumer expects to get a minimum amount of peel in a can of tomatoes; and it is in accord with good commercial practice.

7. In a standard of quality for canned tomatoes, a maximum allowance of one-fourth square inch of tomato blemish per pound of canned tomatoes in the container, as one of the quality factors, would be reasonable and would promote honesty and fair dealing in the interest of consumers for the reason that this quality factor has been in force since 1931 without change; of the thousands of cans of tomatoes examined for this factor but few failed to meet the requirement and the great majority was well below the tolerance; and it is in accord with good commercial practice and consumer understanding of the article.

8. There are no yellow varieties of tomatoes canned and sold under the name of tomatoes unqualified.

* * *

Here is the legislative "Regulation" issued by the Secretary:⁴

Canned tomatoes; quality.

(a) The standard of quality for canned tomatoes is as follows:

(1) The drained weight, as determined by the method prescribed in paragraph (b) (1), is not less than 50 percent of the weight of water required to fill the container, as determined by the general method for water capacity of containers prescribed in § 10.1 (a);

(2) the strength and redness of color, as determined by the method prescribed in paragraph (b) (2) is not less than that of the blended color of any combination of the color discs described in such method, in which one-third the area of disc 1, and not more than one-third the area of disc 2, is exposed;

(3) peel, per pound of canned tomatoes in the container, covers an area of not more than 1 square inch; and

(4) blemishes, per pound of canned tomatoes in the container, cover an area of not more than one-fourth square inch;

(b) Canned tomatoes shall be tested by the following method to determine whether or not they meet the requirements of subparagraphs (1) and (2) of paragraph (a):

(1) Remove lid from container, but in the case of a container with lid attached by double seam, do not remove or alter the height of the double seam. Tilt the opened container so as to distribute the contents over the meshes of a circular sieve which has previously been weighed. The diameter of the sieve used is 8 inches if the quantity of the contents of the container is less than 3 pounds, or 12 inches if such quantity is 3 pounds or more. The meshes of such sieve are made by so weaving wire of 0.054 inch diameter as to form square openings 0.446 inch by 0.446 inch. Without shifting the tomatoes, so incline the sieve as to facili-

⁴ 21 C. F. R. § 53.41 (Supp. 1939).

tate drainage of the liquid. Two minutes from the time drainage begins, weigh the sieve and drained tomatoes. The weight so found, less the weight of the sieve, shall be considered to be the drained weight.

(2) Remove from the sieve the drained tomatoes obtained in (1). Cut out and segregate successively those portions of least redness until 50 percent of the drained weight, as determined under (1), has been so segregated. Commingle the segregated portions to a uniform mixture without removing or breaking the seeds. Fill the mixture into a black container to a depth of at least 1 inch. Free the mixture from air bubbles, and skim off or press below the surface all visible seeds. Compare the color of the mixture, in full diffused daylight or its equivalent, with the blended color of combinations of the following concentric Munsell color discs of equal diameter, or the color equivalents of such discs:

1. Red-Munsell 5R 2.6/13 (glossy finish).
2. Yellow-Munsell 2.5 YR 5/12 (glossy finish).
3. Black-Munsell N 1/ (glossy finish).
4. Grey-Munsell N 4/ (mat finish).

* * *

When one considers the fact that the above regulation pertains only to the quality of canned tomatoes, and that regulations also were needed to regulate the identity of the food product and the nature of the containers in which it was packed; when one considers further that these three operations must be applied to hundreds of foods other than canned tomatoes, one can appreciate the enormity of the legislative task. Should Congress concern itself with such details? Does it have the time? Does it have the expert scientific knowledge necessary for the fixing of these standards?

Suppose, too, that there are emergency situations requiring immediate action to safeguard the lives of consumers of food products,—for example, an epidemic in a certain locality and the danger that food shipped from there might be contaminated with micro-organisms. Is the Congressional machinery swift enough to cope with such problems? To these and other situations Congress apparently answered in the negative. For, instead of undertaking to legislate directly on these problems, it delegated the power to legislate on these matters to administrative authorities. Congress, of course, fixed the broad standards within which the administrative arm of government was to operate—but within these standards, the power to fill in the details was left to administrative authorities. Implicit in these delegations of legislative power is the recognition that Congressional machinery is too inflexible, too cumbersome, and that Congressmen are not equipped with the specialized knowledge

necessary for dealing directly with such problems. Does this mean that the recipients of delegated legislative power may issue "rules" arbitrarily and without restraint? Of course not! As we shall see, there are definite limitations to the rule-making power—constitutional as well as statutory, and that delegated power means power within narrowly circumscribed bounds.

A considerable portion of the time of many lawyers is devoted to the promulgation, attack or defense of some such type of administrative legislation as is involved in the administration of the Federal Food, Drug, and Cosmetic Act of 1938. Although there are similarities between administrative legislation and legislation enacted directly by Congress or by state legislatures, there are salient differences—differences which require different modes of operation for the lawyer engaged in activities in the legislative arena. Some of these are pointed up in the following background study. Let us see what they are:

B. THE NATURE OF ADMINISTRATIVE LEGISLATION ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES

(Report of the Committee on Administrative Procedure,
Appointed by the Attorney General, at the request of the
President, to Investigate the Need for Procedural Reform
in Various Administrative Tribunals.)⁵

Sen. Doc. No. 8, 77th Cong., 1st Session 98-114 (1941)

* * *

MODERN DEVELOPMENT

Broadly speaking, the causes of the growth of administrative rule making are twofold: The increasing use by Congress of "skeleton legislation," to be amplified by executive regulations; and the expansion of the field of Federal control—indeed, of governmental intervention generally—in which the new legislation, like the old, contains its quota of delegations of rule-making power.

* * *The power to promulgate substantive [administrative] regulations having the force and effect of law covers a wide range of private activity. Without attempting an exhaustive catalog, we may note, for example, that the Board of Governors of the Federal Reserve System is empowered to regulate, among other things, margin requirements in securities transactions, reserve requirements for banks, and the maximum rates of interest on deposits. National banks and state banks which are members of the Reserve System may buy investment securities for their own account only under such restrictions and definitions as the Comptroller of the Currency may by regulation pro-

⁵ All of the footnotes have been omitted.

vide. The Securities and Exchange Commission has extensive power to prescribe regulations governing security markets and trading and the operations of public-utility holding companies.

The Fair Labor Standards Act permits the Administrator of the Wage and Hour Division, on recommendation of appropriate industry committees, to issue orders which prescribe wages that vary from the statutory minima and to define the scope of certain exemptions from the Act. The Secretary of Labor is empowered by the Walsh-Healey Act to determine prevailing minimum wages which shall thereafter be paid by contractors in the performance of Government supply contracts. The United States Maritime Commission is authorized to set minimum wage and manning scales, as well as minimum working conditions, for all vessels receiving operating differential subsidies.

The Federal Security Administrator under the Food, Drug, and Cosmetic Act, is empowered to issue regulations fixing legally binding standards of identity, quality, and fill of container for a wide and important range of products and to prescribe labeling requirements and requirements as to content for specific classes of products. The Grain Standards Act authorized the Secretary of Agriculture to set standards of quality and condition for grain which must be used whenever grain is sold by grade in interstate or foreign commerce. Similar acts govern other agricultural commodities.

The Bureau of Marine Inspection and Navigation of the Department of Commerce, for the purpose of promoting safety at sea, issues voluminous regulations governing the construction and operation of vessels. The Civil Aeronautics Administration has similar powers in regard to transportation by air, and the Interstate Commerce Commission with respect to transportation by land. The Federal Alcohol Administration Act authorizes the Administration (now the Alcohol Tax Unit of the Bureau of Internal Revenue) to issue regulations governing certain trade practices in the industry. * * * Other bureaus of the Department have broad rule-making powers over the Alaskan fisheries industry and such matters as the taking of migratory birds and Alaskan game. The Federal Communications Commission has wide authority to issue rules and regulations governing telegraph and telephone carriers, commercial and amateur radio broadcasting and communication, and wireless installations aboard ships and motor lifeboats.

In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so. Some of these, such as many of the rulings of the Treasury Department under the tax laws, take the form of opinions upon specific

statements of fact and should hardly be called regulations; but they often operate as effective precedents. Others, such as the rulings of the Board of Governors of the Federal Reserve System, refer to hypothetical facts and become in effect somewhat generalized opinions of what is lawful and what is unlawful. Some agencies which issue interpretations couched in general terms rather than rulings upon particular facts are careful to distinguish them from regulations that have the force of law; other agencies simply promulgate their interpretations as regulations which are indistinguishable in form from those that have statutory force.

Administrative rule-making, in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulations remain in theory the sole criterion of what the law authorizes or compels and what it forbids. An interpretative regulation even of long standing will be rejected if it is deemed to be in conflict with a clear and unambiguous statute.

This distinction between statutory regulations and interpretative regulations is, however, blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies, especially where these have been followed for a long time. In upholding certain regulations issued by the Commissioner of Internal Revenue, the Supreme Court has stated that "it is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons." Although the courts at times avoid the effect of this doctrine by refusing to apply administrative interpretations which they consider inadmissible, the doctrine has sufficient weight to give much finality to the interpretative regulations of administrative agencies. Consequently the procedures by which these regulations are prescribed become important to private interests and will be considered in this report.

* * *

II. SIGNIFICANT ASPECTS OF RULE-MAKING PROCEDURE

A. THE CHARACTER OF RULE-MAKING PROCEDURE

It has been suggested that the process of administrative rule making is essentially the same as that of legislation and that the procedure which is incident to it may therefore be patterned after that of legislatures. This conclusion, however, does not follow. A legislature is supposed to be as far as possible a cross-section of the community, and its members in theory bring with them a large part of the knowledge and opinion out of which

after open discussion the laws are to be framed. When all due allowance is made for the increasingly important role taken by committees in the legislative process, it remains true that legislative procedure has not been shaped primarily for the purpose of securing anew and from outside sources data and expressions of view that will determine the formulation of a statute.

An administrative agency, on the other hand, is not ordinarily a representative body. Its function is not to ascertain and register its will. The sovereign will has already been broadly expressed. Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. It investigates and makes discretionary choices within its field of specialization. The reason for its existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.

These differences are and should be reflected in its procedures, which should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses. They should also be adapted to eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action. Administrative rule-making proceedings consequently cannot wisely be patterned unthinkingly after legislative analogies.

There are four stages in the rule-making procedures of the Federal administrative agencies. There are (1) the investigation, or study, of the problems to be dealt with; (2) the formulation of tentative ideas regarding the regulations to be issued; (3) the testing of these ideas; and (4) the final formulation of the regulations. These will be dealt with in the discussion which follows, but the historical development of rule-making procedure and the specific procedural devices employed, which form the basis of the discussion, cut across these elements. The latter must be kept in mind as the history and incidents of rule-making procedure are considered.

B. EARLY ABSENCE OF REGULARIZED PROCEDURE

For over a century the Federal statutes conferring rule-making authority were entirely lacking in any definition of the procedure to be followed in the preparation of regulations. No requirement of notice and hearing or of consultation with outside interests was imposed. In a few instances Congress required that regulations have the approval of a superior officer before going into effect. In a few other instances Congress required that the regulations should be laid before it at the time of their issuance

—not, apparently, for approval, but merely to permit the legislature to be informed of the administrative action.

It is hardly to be supposed that in the early days of Federal administration the scattered private interests affected by administrative regulations were regularly consulted in the course of the rule-making process. Importers, Indian traders, pensioners, taxpayers, and the rest may occasionally have written to the authorities to convey their points of view or may have made representations through members of Congress. There is no available record to indicate whether scheduled meetings or hearings ever took place, but it does not seem likely. Administrative knowledge, good sense, and responsibility to Congress probably were the only usual safeguards to affected interests.

C. CONSULTATION AND CONFERENCES

As economic and other groups in the community became organized and vocal, and as legislation affecting them came more and more into existence, administrators, in contact with those upon whom their authority bore, turned to them for information and their points of view. Participation by these groups in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings.

Early in the present century a number of agencies appear to have adopted regularized consultation in connection with their rule-making processes. A 1902 appropriation act brought experts outside the Government into the task of rule-making by appropriating funds "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various states and of the courts of justice."

Ever since its establishment in 1913, the Federal Reserve System has regularly consulted with members of the banking world. Other agencies, among them the Securities and Exchange Commission, the United States Maritime Commission, The Civil Aeronautics Authority, the Federal Communications Commission, the Bureau of Marine Inspection and Navigation, the Bituminous Coal Division, the Grain and Seed Division of the Department of Agriculture, the Bureau of Customs, the Children's Bureau, and the Bureau of Biological Survey, have also conferred, in making rules, with the interests affected by them.

The practice of consulting with private interests leads easily to the establishment of temporary or permanent advisory committees drawn from an industry. During the early years of the

present century the Forest Service consulted with committees of stockmen, the Bureau of Biological Survey with committees of conservationists, and the Secretary of Agriculture with committees of cotton growers in setting cotton standards under the Cotton Futures Act. In 1908 the Transportation of Explosives Act authorized the Interstate Commerce Commission to utilize the services of the American Railway Association in formulating its regulations.

The Revenue Act of 1918 provided for a temporary Advisory Tax Board in the drafting of regulations. The Alaska Game Law of 1925 set up an advisory group to be consulted in the making of regulations. The Fair Labor Standards Act requires that wage orders of the Administrator, varying the statutory minimum-wage rates in particular industries, shall originate with committees of employer, employee, and public representatives.

The practice of holding conferences of interested parties in connection with rule-making introduces an element of give and take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule-making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented conferences have evident advantages over hearings in the development of knowledge and understanding.

* * *

D. HEARINGS

Hearings differ from consultation and conferences in that they are publicly announced in advance and any interested party is permitted to attend and testify. Their use in rule-making is a product of the present century.

A succession of statutes conferring rule-making authority upon the Interstate Commerce Commission has provided that certain regulations should issue only "after hearing" or "after full hearing." Such provisions were contained in the Safety Appliance Act as amended in 1903 and as supplemented in 1910 and in the Boiler Inspection Act of 1911. In 1917 the Commission was empowered, "after hearing," to establish rules, regulations, and practices with respect to car service.

* * *

* * * In 1938 Congress adopted a legislative requirement of formal hearings in connection with several varieties of regulation of products under the Food, Drug, and Cosmetic Act. Before that the Plant Quarantine Act of 1912, the Importation of Adulterated Seeds Act, as amended in 1926, and the Federal Seed Act of 1939. contained the hearing requirement in connection with rule-making. The latter act is unique in extending the require-

ment to virtually all types of regulations, including procedural regulations.

Since the variation of tariff rates has become an administrative matter, the requirement of hearings in advance of recommendation to the President that rates be altered has been included in the statutes. Hearings are also required to be held under the Trade Agreement Act before concluding an agreement to alter rates of duty.

Several recent statutes governing trade practices in general terms to be amplified by administrative regulations, call for hearings as part of the process of formulating the regulations. Included in this list are the Federal Alcohol Administration Act of 1935, which significantly omits the hearing requirement for other types of regulations, such as regulations to define the non-industrial uses of alcohol and those regulating the sale of distilled spirits in bulk; the Commodity Exchange Act of 1936 with respect to altering the minimum period of notice of delivery of grain under contract; and the Robinson-Patman Act of the same year with respect to price differentials on quantity sales in industries having a small number of large purchasers.

The regulation of wage rates has generally been attended by hearings, either through administrative choice or by reason of statutory requirements. Thus wage determinations under the Walsh-Healey Act, applying to work on products supplied to the United States, have regularly been made after hearing, although the statute does not so require. Wage-fixing by the United States Maritime Commission and by the Secretary of Agriculture under the Sugar Act of 1937 must be accompanied, respectively, by "appropriate hearings" and by "investigation and due notice and opportunity for public hearings." The Fair Labor Standards Act of 1938 not only requires the participation of industry committees in the formulation of industry wage orders as previously noted, but also requires the Administrator to hold hearings upon the committees' proposals and to base his action approving them upon evidence adduced at the hearings.

Governmental price fixing has also been accompanied by the statutory hearing requirement. Rate fixing for public utilities has been attended by a high degree of procedural formality; and the same kind of procedure has been employed under the Packers and Stockyards Act as respects both stockyard companies and "market agencies," or commission merchants. In these instances, however, the number of enterprises having their rates fixed in a single proceeding is quite limited, with the consequence that rate fixing has come to be thought of as adjudication rather than as rule making. * * *

* * *

So it will be seen that hearings are now generally held in connection with the fixing of prices and wages, the prescription

of rules for the construction of vessels and other instruments of transportation, the regulation of ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.

* * *

E. ADVERSARY HEARINGS

Hearings in rule-making are usually either investigatory or designed to permit persons who may not have been reached in previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency and to protect private interests against uninformed or unwise action.

Rule-making proceedings do occur, however, in which an adversary element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. Low-cost producers as against high-cost producers with respect to maximum prices or minimum wages; workers as against employers with respect to wages or working conditions; buyers as against sellers with respect to the regulation of agricultural marketing; the makers of machinery which will be barred by proposed safety regulations as against others whose product will be lawful; these are recurring divisions of interested parties which from time to time confront an administrative agency engaged in rule making. Frequently the number of parties constituting a single interest is small and existing members are known. In any event, whether their number is great or small, they may often gain or lose with relative finality in the rule-making proceeding itself. The content of the regulations when issued may be definite and the consequences of noncompliance severe, such as the loss of the right to do business. Under these circumstances it may be desirable to let affected parties treat the rule-making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be publicly disclosed to opposing interests which may answer, explain, or rebut. For this purpose the procedure of consultation and conference and of nonadversary hearings may be inadequate. Where this is the case, hearings, in which information is introduced as evidence subject to refutation and often to cross-examination, have come to be employed.

Hearings of this type may be held by administrative choice, as in the case of some proceedings of the Federal Communications

Commission, or because of statutory requirements, as in the case of the Food and Drug Administration and the Wage and Hour Division. Recent statutes containing these requirements go far in prescribing procedures previously encountered only in connection with adjudication. They require findings of fact to support the administrative regulations and either require in terms that these findings be based exclusively upon evidence in the record of the hearing, or authorize the courts, in statutory review proceedings, to set aside the regulations because an essential finding lacks substantial evidence in the record to support it. The agencies subject to these requirements are thus compelled to bring forth the entire bases of their rule-making determinations at oral hearings and to record in writing the stages by which they arrive at their conclusions.

The application of the procedures of a judicial trial to administrative rule making is limited, however, by the distinctive characteristics of rule-making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully. The problem is evident, for example, in the case of a set of regulations which in thousands of paragraphs lays down rules for ship construction or one which governs as discretionary a matter as the nature of the disclosures to be made in a registration statement for new issues of securities.

* * *

Thus far the resulting procedure [in the adversary type of rule-making] has been cumbersome and expensive. The record and exhibits lying back of the recent bituminous coal price order totaled over 50,000 pages; the trial examiner's report embraced approximately 2,800 pages in addition to exhibits, and the Director's report consisted of 545 single-spaced legal-size pages, exclusive of indices, annexes, and price appendices. Wage-order records under the Fair Labor Standards Act run from 600 to 10,000 pages each. The hearing process under the Food, Drug, and Cosmetic Act has required from 5 to 11 months for completion. The bituminous-coal price order was issued more than two years after the present phase of the procedure leading to it was begun.

Even if the expense and delay of these adversary rule-making processes cannot be wholly eliminated, they may, insofar as they

do not constitute a break-down of governmental regulation, purchase advantages which justify them. The ultimate judgment of whether they do or not should determine whether they are to be continued. The possible advantages are primarily those, including greater satisfaction to the parties, which result from the check to which the evidence and arguments may be subjected by counter evidence, cross-examination and argument. They include also the discipline to which the reasoning of an administrative agency is subjected when it must make findings based upon identified evidence and predicate its conclusions, in turn, upon these findings. * * *

* * *

F. INVESTIGATIONS

Much that occurs at a hearing or conference [with respect to rule making] is conditioned by the investigation of the problem which may have preceded it, or of which the hearing may be a part. Where conferences and hearings are not held, the initial investigation is of all-embracing importance in the rule-making process. Where conferences and hearings are held after the investigatory stage has passed, they may or may not add to the information of the agency. Hence the initial investigation is of primary significance in most instances of rule making. The methods by which it may be conducted are of great importance to affected private interests.

The investigation may be conducted within the agency by bringing to bear upon the problem the experience of its staff, and the accumulated information in its records. Or information may be sought by summoning witnesses and obtaining documents for examination in a public proceeding. Often both methods are followed. The Interstate Commerce Commission has preceded a number of its regulations and broad rate orders by special investigations and investigatory hearings. The Federal Power Commission has issued rules not involving actual regulation of business on the basis of information developed by its staff from its records, but conducted an extensive investigation of accounting systems, consulted interested groups, and held hearings upon its proposed accounting regulations for electric and natural gas utilities. The Federal Alcohol Administration (now the Alcohol Tax Unit), the Federal Communications Commission, and the Securities and Exchange Commission all engage in elaborate studies of problems that are to be covered in regulations. At least two of the investigations of the latter agency have covered periods of several years. The Tariff Commission conducts one of the most elaborate fact-gathering systems in the Government, involving both continuous accumulation of data and investigation and report upon special problems, with resort to field work at home and abroad where necessary.

The investigation is usually set in motion by the agency itself. Only rarely is it initiated by a private party, as is the case, for example, with some of the safety regulations of the Interstate Commerce Commission that are sought by labor unions. In the course of the investigation, study of available data, inspections, consultations, requests for information from private parties, and organized field studies are the means typically employed. To a considerable extent, data procured under statutory powers to require reports or to inspect premises and records are made use of in the investigations. In relatively few instances, but nevertheless in some, hearings are employed as the initial means of gathering information. In these various ways an agency prepares itself either to issue regulations without further formality or to proceed to the scheduled conferences or hearings from which its regulations will issue.

The continuous use of consultation and conference by the Board of Governors of the Federal Reserve System has already been described. This interchange of information and opinion between the Board and the world of banking and finance is part of a program of study and observation which keeps the Board in constant touch with the matters that are subject to its authority. Research is a major part of the Board's work and its staff is made up in large part of specialists who are qualified to gather and interpret the necessary data. The product is a body of knowledge regarding business and credit, set forth in indexes, graphs, and reports, which, as published in the Federal Reserve Bulletin, constitutes a leading source of information in the United States regarding economic conditions. It forms the base upon which many of the Board's regulations rest.

When it comes to the preparation of a specific regulation, the process ordinarily begins with special analyses and studies by sections of the staff. If necessary, questionnaires may be circulated and field trips may be undertaken by staff members. Regulation T, regulating margins under the Securities Exchange Act, which presented a somewhat novel problem to the Reserve Board, was preceded by the circulation of 200,000 questionnaires by the stock exchanges to their members at the request of the Board, to obtain information on the actual condition of margin accounts. Several of the Board's aides also traveled about the country interviewing persons who might be affected. The analyses and studies which are prepared by sections of the staff are circulated among other parts of the Board's organization for comment. Consultations, both within and outside the Board, take place thereafter until the final product issues.

A less refined, more decentralized process is employed by the Comptroller of the Currency in regulating the investments which banks may hold. The backbone of the Comptroller's staff is the traveling bank examiners and the district chief examiners, whose

knowledge and views constitute a leading basis for determining the content of the regulations. A file of letters from bankers, is, however, maintained in Washington. When new regulations are to be formulated the material bearing upon them, including to some extent the views of bankers, as ascertained by the examiners, is assembled, and, after consultation within the agency and with other banking control agencies, the regulations issue.

Still more in contrast to the centralized methods of investigation of the Federal Reserve System are those of the Bureau of Marine Inspection and Navigation. The rule-making authority here is a Board of Supervising Inspectors, composed of members whose normal duties are to conduct and administer the inspection of vessels and the disciplining of seamen in the ports of the United States. They bring to their rule-making task at annual and special meetings the knowledge born of their field experience and previous training. The headquarters of the Bureau are not equipped to carry on continuous research in the problems of safety with which the regulations deal. The early origin of the Bureau, before continuous research was a usual government function, is thus reflected in a form of basic organization which is adapted to a "practical," rather than a scientific, handling of its problems. In recent years, however, as experience has shown the need of elaborate revisions and amplifications of many of the Bureau's regulations, drafts of regulations have been prepared by the headquarters staff through the use of a procedure which includes consultation with experts in marine engineering, the study of records of marine casualty investigations, meetings of the supervising inspectors, submission of proposed regulations to the industry, and hearings.

At times an administrative agency relies upon the hearing as the only means of investigation. Such was the case, for example, in connection with the Maritime Commission's establishment of minimum wage scales for ships operated under subsidies administered by the Commission. Following hearings which were held at ten principal ports, and after a report by its Division of Maritime Personnel, the Commission issued its wage scales.

The extent to which administrative agencies rely upon accumulated information or special investigations in rule-making depends in large part upon the amount of time they have had to familiarize themselves with their problems. The Interstate Commerce Commission has been able in some important instances affecting motor carriers to formulate and issue regulations without special investigation or proceedings of any kind. The Bureau of Biological Survey employs such complete and continuous methods of keeping in contact with the problems of wildlife conservation and with the opinions and judgment of sportsmen, state conservation officials, and others interested, that its regulations issue in the normal course of its work and on the basis

of its current and accumulated knowledge, with no additional investigation or formality except the submission of its tentative conclusions to the annual convention of the International Association of State Game, Fish, and Conservation Commissioners. On the other hand the newer wage-fixing agencies are obliged to start virtually from scratch in defining and ascertaining the circumstances of the industries with which they deal.

Some agencies employ a special investigating body devoting itself wholly to rule-making. The Public Contracts Board in the Division of Public Contracts of the Department of Labor holds hearings and makes recommendations for wage determinations under the Walsh-Healey Act. Under the Fair Labor Standards Act the industry committees both receive information about the industry concerned and express the views of their members. The Food and Drug Administration employs a Food Standards Committee, which collects information on products for which standards are to be proposed and formulates the proposed standards. The Bureau of Explosives of the American Railway Association in effect performs similar functions for the Interstate Commerce Commission.

* * *

C. THE PROCEDURES INVOLVED IN ADMINISTRATIVE LEGISLATION

INTRODUCTORY NOTE

In studying the foregoing materials on administrative rule-making, one is apt to ask: are not many of the procedures there described much the same as are involved in the process of law-making by legislatures? Does not Congress, for example, investigate before it legislates? Does it not hold hearings and elicit information from those interests which might be affected? And is not Congressional legislation, like administrative legislation, subject to judicial review? To answer these quickly in the affirmative loses sight of the fact that legislatures sometimes legislate without benefit of investigations or public hearings; that whatever opportunity for a full dress hearing is given to affected parties prior to the enactment of a law by a legislative body does not come as a matter of legal duty, but rather of legal privilege. True, legislation enacted by legislatures may be challenged on constitutional grounds before the courts—but these grounds do not include the failure to give notice, grant a hearing or undertake an investigation prior to the enactment of law. On the other hand, the procedures for the formulation of administrative legislation, may by statute be made a matter of legal duty—thus making it possible for such legislation to be attacked not only on substantive grounds, but on procedural grounds as well.

What are these procedures? Where may they be found? The general types of procedure involved in administrative rule-making are outlined in the foregoing study. As indicated in that

study, many administrative agencies have adopted some of these procedures without any legislative prodding; other procedures are spelled out in detail in the statutes which delegate legislative power to the particular agencies (see, for example, the procedural requirements contained in Section 701 of the Federal Food, Drug, and Cosmetic Act of 1938); and where the statutes are either vague or silent with regard to procedures for administrative rule-making, courts may often read some of them in by implication. Recently, Congress, by enacting the Federal Administrative Procedure Act⁶ endeavored to formalize and unify many of the procedures of federal administrative agencies. This Act is reproduced in the Supplement, pp. 58 to 69. Note particularly those provisions of the Act which pertain to the procedures for federal rule-making (legislation) as distinguished from the order making (adjudicatory) activities of those agencies.⁷

THE REQUIREMENTS OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

It will be noted that the Federal Administrative Procedure Act deals with different types of rule making in three different ways. It exempts one cluster of rule-making activities from procedural requirements—matters involving military, naval or foreign affairs, and those relating to agency management, personnel, public property, loans, grants, benefits or contracts. A second group of activities is subject to the procedures described in section 4 of the Act, if there is no statutory requirement that they be made on the record after an agency hearing. The third group of rule-making activities is subject to the procedural requirements of sections 7, 8 and 11 of the Act, if they involve rules required by statute to be promulgated on the record after opportunity for an agency hearing. Of these various types, the third, or the "adversary" type, probably offers the greatest amount of activity for the lawyer. For inasmuch as it involves a greater number of procedural safeguards, it also enlarges the opportunity for a greater amount of litigation when these safeguards are denied in the rule-making process.

PROCEDURES INVOLVED IN THE FIXING OF STANDARDS OF QUALITY OF FOODS UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT OF 1938

A good example of the adversary type of administrative legislation is in the fixing of standards of quality of foods under

⁶ 60 Stat. 237 (1946), 5 U. S. C. A. Appendix § 101 (1947).

⁷ Some states have dealt with administrative procedures by piecemeal legislation—the procedures usually spelled out in the same statutes which delegate particular legislative power to a particular agency. Other states have enacted legislation dealing with the procedures in administrative agencies generally—much in the same way as was done under the Federal Administrative Procedure Act. Many of these procedures vary so from state to state and from agency to agency that any treatment of them in this volume would, at best, be sketchy. Just what these procedures are should be ascertained by vertical studies in each respective jurisdiction.

§ 701 (e) of the Federal Food, Drug, and Cosmetic Act of 1938.* (See Supplement, p. 22.) In view of the fact that the rules under this section are required to be made on the record after opportunity for agency hearing (see § 4 (b) of the Federal Administrative Procedure Act, Supplement, p. 61), the procedural requirements of sections 7, 8 and 11 of that Act are applicable. Long before the enactment of the Federal Administrative Procedure Act, the Secretary of Agriculture established—by administrative order—the following procedures for this type of rule making, procedures which even at this date seem to be in substantial compliance with the requirements of the Federal Administrative Procedure Act:†

§ 2.701 Definitions. As used in §§ 2.701-2.715:

(a) The term "Act" means the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938 (52 Stat. 1040, as amended; 21 U. S. C., and Sup., 301-392).

(b) The term "Agency" means the Federal Security Agency of the United States.

(c) The term "Administrator" means the Federal Security Administrator.

(d) The term "Federal Register" means the publication provided for by the Federal Register Act of July 26, 1935, and Acts supplementary thereto and amendatory thereof (49 Stat. 500, 50 Stat. 304; 44 U. S. C. Chapter 8A).

(e) The term "person" includes an individual, partnership, corporation, and association.

(f) The term "Hearing Clerk" means the Hearing Clerk of the Agency.

HEARING AND NOTICE THEREOF

§ 2.702 Hearings under section 701 (e) of the Act, except hearings with reference to regulations under section 404 (a) of the Act. The Administrator, on his own initiative or upon an application of any interested industry of substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401, 403 (j), 406 (a) and (b), 501 (b), 502 (d), (h), 504, and 604.

* Other regulations under the Food, Drug, and Cosmetic Act which come within this third category of rule-making are those which deal with special dietary properties (Sec. 403(j)), the issuance of emergency control permits (Sec. 404(a)), the establishment of tolerances for poisonous ingredients in food (Sec. 406(a)), the certification of coal tar colors for food, drugs, and cosmetics (Sec. 406(b)), the strength, quality and purity of official drugs (Sec. 501(b)), habit-forming drugs (Sec. 502(d)), and drugs liable to deterioration (Sec. 502(h)).

† 21 Code Fed. Regs. 2.701-2.715 (Cum. Supp. 1944). The procedures which do not comply with the requirements of the Federal Administrative Procedure Act are, to that extent, of course, modified.

§ 2.703 Notice of hearing. The Administrator shall give notice of the hearing by filing the same with the Archivist of the United States for publication in the Federal Register. The notice shall set forth the proposal in general terms and shall specify the time, which shall not be less than 30 days after the date of the notice, and the place for the public hearing.

§ 2.704. Designation and powers of presiding officer. (a) Each such hearing shall be conducted by a presiding officer, who shall be the Administrator or such officer or employee of the Agency as the Administrator may designate for the purpose. Any such designation may be made or revoked by the Administrator at any time. Such hearing shall be conducted in an informal but orderly manner in accordance with the rules in §§ 2.701-2.715, and, where such rules are inapplicable or incomplete, in accordance with the directions of the presiding officer. The presiding officer shall have power to administer oaths, examine witnesses, and receive evidence, and to rule upon the admissibility of evidence and other matters that arise in the course of the hearing, but, except where the presiding officer is the Administrator, shall have no power to decide any motion which involves final determination of the merits of the proceeding.

(b) The hearing shall be held at the time and place set forth in the notice of the hearing, but may at such time and place be continued from day to day and adjourned to a later day or to a different place, within the city designated in the notice, without notice other than the announcement thereof by the presiding officer at the hearing.

PROCEDURE AT HEARING

§ 2.705 Appearances. At the hearing, any interested person shall be given an opportunity to appear, either in person or through his authorized representative, and to be heard with respect to matters relevant and material to the proposal. Any interested person who desires to be heard in person at any hearing under the rules in §§ 2.701-2.715 shall file with the presiding officer a written appearance setting forth his name, address, and occupation. If such person desires to be heard through a representative, such person or such representative shall file with the presiding officer a written appearance setting forth the authority for such representative and the names, addresses, and occupations of such person and such representative. Any such person or such representative shall give such other information respecting his appearance as the presiding officer may request. All present at the hearing shall conform to all reasonable standards of orderly and ethical conduct.

§ 2.706 Order of procedure. (a) The presiding officer shall have noted on the record his designation as presiding officer and

the notice of the hearing as filed with the Archivist of the United States. This shall be done by filing as an exhibit for the record a copy of the Federal Register containing such designation and such notice. If the designation has not been published in the Federal Register, the presiding officer shall file as an exhibit the order of the Administrator designating him to preside.

(b) To promote orderliness and clarity of the record, evidence shall be received with respect to the subject matter of the hearing in the following order, except as the presiding officer otherwise may permit:

(1) Evidence with respect to the proposal in general, including such matters as its historical background, the reason for the proposal, and its probable effect. No evidence shall be introduced at this stage of the hearing as to any specific provisions of the proposal.

(2) Evidence with respect to specific terms of the proposal, which shall be read and considered section by section in a sequence to be determined by the presiding officer. Suggestions to add to, delete, or alter any portions of a given section of the proposal shall be made as consideration of such section is reached and, insofar as practicable, shall be submitted in writing.

(3) At each stage of the hearing, whether general or specific, evidence shall be received first in support of the proposal, followed by the evidence opposing the proposal.

§ 2.707 Submission and receipt of evidence. (a) Each witness shall, before proceeding to testify, be sworn or make affirmation.

(b) When necessary in order to prevent undue prolongation of the hearing, the presiding officer may limit the number of times any witness may testify to the same matter or the repetitious examination and cross-examination of witnesses, or the amount of corroborative or cumulative evidence.

(c) The presiding officer shall admit only relevant and material evidence.

(d) Opinion evidence shall be admitted when the presiding officer is satisfied that the witness is properly qualified.

(e) Affidavits, if relevant and material, shall be received and marked as exhibits, provided they are filed with the presiding officer on or before the date of the opening of the hearing. Every interested person shall be permitted to examine all affidavits which have been so filed and to file counter-affidavits with the presiding officer, within a period of time, to be fixed by the presiding officer, not more than five days following the close of the hearing. In any event, the Administrator will consider the lack of opportunity for cross-examination in determining the

weight to be attached to statements made in the form of affidavits.

(f) If any person objects to the admission or rejection of any evidence, or other limitation of the scope of any examination or cross-examination, he shall state briefly the grounds of such objection, and the transcript shall not include argument or debate thereon except as ordered by the presiding officer. Any such objection shall be made before the presiding officer in order subsequently to be relied upon in the proceeding. A ruling of the presiding officer on any such objection shall be a part of the transcript, together with such offer of proof as has been made.

(g) Samples may be displayed at the hearing and may be described for purposes of the record but shall not be admitted in evidence as exhibits.

§ 2.708 Transcript of the testimony. Testimony given at a hearing shall be reported verbatim. All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall be marked for identification and, upon a showing satisfactory to the presiding officer of their authenticity, relevancy, and materiality, shall be received and marked as exhibits in evidence. Such exhibits (including affidavits) shall, if practicable, be submitted in quintuplicate and in documentary form. In case the required number of copies are not made available, the presiding officer shall exercise his discretion as to whether said exhibit shall when practicable be read in evidence or whether additional copies shall be required to be submitted within a time to be specified by the presiding officer. Where the testimony of a witness refers to a statute, or to a report or document, the presiding officer shall, after inquiry relating to the identification of such statute, report, or document, determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. Where relevant and material matter offered in evidence is embraced in a report or document containing immaterial and irrelevant matter, such immaterial and irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the presiding officer.

§ 2.709 Oral and written arguments. (a) Unless the presiding officer shall issue an announcement at the hearing authorizing oral argument before him, it shall not be permitted.

(b) The presiding officer shall announce at the hearing a reasonable period within which interested persons may file written arguments based solely upon the evidence received at the hearing, citing the page or pages of the transcript of the testimony where such evidence occurs.

§ 2.710 Filing the record of the hearing. As soon as practicable after the close of the hearing, the complete record of the hearing shall be filed in the office of the Hearing Clerk. The record of the hearing shall include the transcript of the testimony, including any exhibits and together with any written arguments that may have been filed with the presiding officer.

§ 2.711 Copies of the record of the hearing. The Agency will make provisions for a stenographic record of the testimony and for such copies of the transcript thereof as it requires for its own purposes. Any person desiring a copy of the record of the hearing or of any part thereof shall be entitled to the same upon application to the Hearing Clerk and upon payment of the costs thereof. Suggested corrections to transcripts of the testimony shall be considered only if offered within a period (to be fixed by the presiding officer) of not more than 3 days following the completion of the testimony, for which purpose the record shall be kept open for such additional period. The presiding officer shall have authority to act upon such suggested corrections.

ISSUANCE OF ORDER

§ 2.712 Proposed order. The Administrator, within a reasonable time after the filing of the record of the hearing, will issue his proposed order, which shall be served upon the interested persons whose appearances were entered at the hearing by publication in the Federal Register or by mailing a copy of the proposed order to each of such persons by registered mail: Provided, however, That if, after examination of the record of the hearing, the Administrator finds that no controversy with respect to the subject of the hearing exists between the persons who appeared thereat, and that such action will promote the purposes of the Act, the Administrator will issue a final order in lieu of issuing a proposed order in accordance with this section.

§ 2.713 Exceptions. Within a reasonable time, which shall be specified in the proposed order but shall not exceed 20 days from the time of the issuance of such order, any interested person whose appearance was filed at the hearing may file exceptions to the proposed order. The exceptions shall point out with particularity the alleged errors in said proposed order, and shall contain a specific reference to the page of the transcript of the testimony or to the exhibit on which each exception is based. Such exceptions may be accompanied by a memorandum brief in support thereof.

§ 2.714 Final order. The Administrator thereafter will issue his final order. A duplicate original thereof shall thereupon be filed with the Archivist of the United States and pub-

lished in the Federal Register. A duplicate original thereof shall also be filed with the Hearing Clerk for public inspection.

PUBLIC NOTICE OF REGULATIONS

§ 2.715 Public notice of regulations. Public notice of the issuance of the foregoing rules of practice for hearings in §§ 2.701-2.714 shall be given by publishing the same in the Federal Register.

A PRACTITIONER'S VIEW OF THESE PROCEDURES

How does this procedure actually work out in practice? The following views of one of the practitioners in the field should illuminate some of the problems and provide—though vicariously—some of the flavor of the proceedings:

H. THOMAS AUSTERN, THE FORMULATION OF MANDATORY FOOD STANDARDS¹⁰

2 Food, Drug and Cosmetic Law Quarterly 532,
574-580, 583-589, 591 (1947)¹¹

* * *

PROCEDURAL SAFEGUARDS

* * *

The procedure for the formulation of food standards [under section 701 (e) of the Federal Food, Drug and Cosmetic Act] has been described as "legislation by litigation." Its requisite elements are: (1) a public hearing pursuant to adequate notice; (2) detailed findings of fact; and (3) the findings and order based on substantial evidence of record. To ensure compliance with these procedural requisites, immediate and direct court review is afforded, and collateral attack is likewise available in any prosecution or seizure based on the standard. Whether these requirements are more advanced, different, or superseded by the Administrative Procedure Act of 1946, may be left to others to develop.¹² Taken together, they appear to reflect the Congressional belief that freedom of enterprise should be the general rule, and governmental regulation the necessary exception. In short, there must be an affirmative basis for regulation. Section 701 is designed to require that the existence of public need be found, that the supporting facts be affirmatively adduced and tested in open hearing, and that administrative

¹⁰ The selected footnotes have been renumbered.

¹¹ Copyrighted by Commerce Clearing House, Inc., reproduced by permission.

¹² Generally speaking, little change seems to be required. See Goding, the Impact of the Administrative Procedure Act on the Administration of the Federal Food, Drug, and Cosmetic Act, 2 Food, Drug, Cosmetic Law Quarterly (1947) 139, 150-52; Markel, The Impact of the Federal Administrative Procedure Act on The Federal Food, Drug, and Cosmetic Act, New York University School of Law Institute Proceedings. The Federal Administrative Procedure Act and the Administrative Agencies (1947) 389.

determination be made only on an objective examination of what is in the record. The Administrator's judgment on an adequate record is final; but whether he has had enough on which to judge and has judged fairly can be scrutinized.

Whether this prescription for trial methods in rule-making is a practicable mode of government remains to be seen. A consideration of some of the difficulties, which have thus far arisen in the attempt to follow it, may aid in the evaluation. In anything that is said, it is necessary to remember that the process was novel, that there were a few men to do much work, and that it is difficult to act judiciously at all times—particularly when one's own proposals, sincerely believed to be in the public interest, are being assailed with vigor. Plato's hope that for a better world kings might become philosophers and philosophers kings often finds an echo in the suggestion that administrators might learn how to be better judges and reviewing judges perhaps have a stint as administrators.

A. THE HEARING

As one objector eventually expressed it, "If it ain't in the record, it ain't so." This adequately reflects the statutory insistence that the order be based only on substantial evidence of record. In a sense, limiting administrative rule-making only to evidence of record is a paradox. The task of formulating the regulation is entrusted to administrative officials because of their training. They are qualified to judge better because of what they already know. The requirement that the record disclose everything entering into the judgment is somewhat inconsistent and causes the difficulty, later discussed, of determining how large a record must be developed to be adequate.

Nevertheless, the hearings under Section 701 serve a twofold purpose. They afford the vehicle for production of the substantial evidence on which the regulation must be based. It is probably immaterial whether the government or anyone else introduces such evidence; but without it the technical predicate for a valid order is wanting. Beyond this, there are excellent reasons for a hearing which would have force even if further procedural requirements did not exist. No greater safeguard against ill-advised or arbitrary action exists than to require that he who would act must appear and articulate at least the immediate facts on which he is acting, and why he thinks the desired result will be achieved. The Act, as interpreted in the Rules of Practice for Hearing, goes further and permits cross-examination by anyone.¹³ The Attorney-General's Committee early noted that this gives "greater satisfaction to the parties" and affords a "check to which the

¹³ Subject to limitation to prevent undue prolongation of the hearing. Section 2.707.

evidence and arguments may be subjected by counter-evidence, cross-examination, and argument."

Sometimes the proceeding gets out of hand. "Any person" may object, cross-examine, and, unfortunately, argue. The exciting discovery that one need not be a lawyer to cross-examine is too tempting; a secretly harbored conviction that but for fate another Erskine was born, can be gratified. The Presiding Officer is properly indulgent, particularly where the newly born advocate has no counsel. Typically, the witness is harangued; long, winding questions are asked embodying the views and sometimes the autobiography of the questioner; and sometimes the witness is simply badgered. A skillful witness often frustrates the amateur lawyer. The latter quickly picks up superficial tricks; asks that the record be read back; throws his personal discourse into the form of a "hypothetical question"; and insists that he is merely checking the witness' qualifications in his own way. What results is sometimes not a record but chaos.

The result, however amusing, has serious consequences. Facts are confused. The record becomes confounded and costly. There is some evidence or talk on everything. Not only might any finding be supported by testimony, but intelligent court review of this kind of transcribed confusion becomes extremely difficult. In addition, some of the hearings seemed to go on endlessly. One group of cherry canners arrived on the announced date, in response to a notice of a hearing on canned fruits, and could not be heard until a week later. Necessarily, the burden on both the Government and everyone else is measurably increased.¹⁴

Available remedies to secure a better hearing are not easy to suggest. To a large extent, the caliber of the Presiding Officer is determinative. No one suggests that the opportunity to be heard be limited to lawyers. Perhaps more extensive use of informal conferences with the Food Standards Committee—outside the statutory hearing and considerably prior to it—will permit crystallization of issues, will indicate what needs be adduced for a complete record, and will focus attention on what usually are only the few controversial issues.

At the present time, the Committee is a forum for informal presentation of information. In many instances, reluctance exists in frankly presenting the facts and inherent difficulties. This appears to flow from an unwarranted apprehension that either the Food and Drug Administration or industry representatives may in the future be bound by these informal discussions. What is needed is more of the conference table approach—a

¹⁴ The physical size of the record may become particularly troublesome because the present Rules nominally afford only twenty days for filing exceptions to a proposed order. (Section 2.714.) Their preparation in this period, against a lengthy and confused record, is no light task.

frank exploration of all of the issues, forthright comment by all present, discussion and evaluation of the available scientific literature, and possibly even suggestions as to how an adequate record may be developed at the hearing. Possibly the Presiding Officer, later to conduct the formal hearing, could attend and become acquainted with the subject matter. Insofar as possible, these pretrial techniques could be profitably pursued.

* * *

Related to the kind of record which may be evolved is the question of notice. The statute requires thirty days' notice setting "forth the proposal in general terms." How much notice is enough is both a question of fundamental fairness and likewise a legal prerequisite to a valid order. In several early instances, the published proposed regulation embodied requirements which did not appear in the notice, were not mooted at the hearing, and were deemed important. * * *

Whether thirty days' notice is sufficient depends upon what is done informally prior to hearing. Insofar as the Government is concerned, the expanded use of the Food Standards Committee exploratory meetings is highly desirable. Beyond this, early official announcement of the intention to call a hearing—often given and a highly desirable practice—will permit adequate preparation and participation by industry. This is the touchstone, not only for protection of a particular interest, but also to facilitate the administrative job. * * *

* * *

B. DETAILED FINDINGS OF FACT

The finding of facts by a trial judge is one of the most sensitive and delicate parts of the judicial art. Respect to it is paid in Rule 52 of the Federal Rules of Civil Procedure and in a multitude of appellate decisions. Transposition of the phrase to administrative activity should not obscure important differences in function. Usually, the trial judge sees and hears the witnesses, and seldom is his judgment on credibility disturbed. In the administrative process under Section 701, the Presiding Officer alone meets the witnesses, and the Administrator's decisions (assuming his detailed exploration of the record on key issues) are made on an impersonal transcript. A judge is aided by proposed findings filed by the parties; and this practice, though permitted, is not followed extensively in standard-making proceedings. Moreover, the trial judge endeavors to make findings on all controverted issues; he seeks to record his judgment and present an adequate picture of all of the relevant testimony. What sometimes happens in food standard findings will be reviewed. But more important is the fact, unavoidable in rule-making, that in effect those who are parties to a con-

trovery ultimately participate in its decision and in the preparation of the findings on which in large measure judicial review will turn.

Consequently, the administrative findings, both proposed and final, made in response to the statutory requirement that they be detailed, offer a revealing index of how evidence is treated.

* * *

C. SUBSTANTIAL EVIDENCE OF RECORD

* * *

The language of Section 701 makes it clear that any regulation must be based "only on substantial evidence of record at the hearing." It is a fair observation that, in almost all contested standard proceedings, vigorous exceptions have been filed challenging the proposed order on the ground that substantial evidence was lacking. Despite the record of judicial approval,¹⁵ it is on this issue that the proceedings up to this time are possibly subject to warranted criticism.

Court decisions offer compelling general language as to the meaning of "substantial evidence." The road through the cases is long and need not be traversed beyond the cogent remark of Mr. Justice Stone that "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established."¹⁶ What has evoked criticism have been practical questions of proof which have emerged in actual proceedings. They are important wholly apart from whether they might run the gamut of judicial scrutiny on appeal. Eventually, some of them might endanger the entire process.

Cardinal is the problem of opinion evidence. The Rules of Practice hopefully prescribe that, "opinion evidence shall be admitted when the presiding officer is satisfied that the witness is properly qualified" (Section 2.707 (d)). This throws no light whatever on the weight to be given such evidence. In the very early proceedings, particularly those to standardized canned foods, a witness would describe the product, advert briefly to the proposed standard, and then be asked:

"Based on your judgment, training, and experience, do you believe that the proposed standard is reasonable and will promote honesty and fair dealings in the interest of consumers?"

¹⁵ Out of nine cases, only one standard has been invalidated by a District Court. * * *

¹⁶ *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300, 83 L. ed. 660, 59 S. Ct. 501 (1939). See also *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 83 L. ed. 126, 59 S. Ct. 206 (1938); and, generally, Stephens, *Administrative Tribunals and the Rules of Evidence* (Cambridge, 1933).

The not unexpected affirmative answer was usually cited as substantial evidence. Where a controversy developed, the early tendency was to build up the expert instead of the facts, and often the final order was based more on one man's opinion about the facts (largely subsumed) than on the facts themselves.

Not unnaturally, this led either to an attempt to discredit the qualifications of the opposing challenged expert or to the effort to produce a better one to overbalance him. It looked for a time as though hearings would mean and substantial evidence consist largely of a battle of experts. In this game, the Government usually came off best.

At the heart of this controversial area is the use of the Administrator's own employees as expert witnesses. Difficult indeed has been the lot of one Departmental official who has been put in the unique position of being presented and qualified as an expert on flour, bread, cheese, evaporated milk, tomatoes, peas, oleomargarine, oysters, beans, corn meal and most other products. In each instance, his assigned task has been to present general observations, to qualify himself as an expert, and to offer opinion testimony as presumably responsive to the data presented by others. In large measure, these difficulties derive from the limitations of staff and a commendable abundance of zeal in the advancement of this standard-making program. Yet these factors do not lessen the task of industry counsel, who must reluctantly seek to establish lack of qualifications. Although, with all due deference, no one could be an expert on all these subjects, the gentleman in question is a splendid witness and the job of cross-examination is far from easy. Nor does lack of staff change the fact that anyone's opinion, absent factual basis, is not substantial evidence.

No one challenges the technical competence of Department experts on questions of technical fact—what testing methods are available, what chemical analysis of a product has shown, or what the scientific literature discloses. This is their job; these men are skilled; and this basic data is essential for an adequate record. It is only where opinions are substituted for testimony as to facts, where these opinions concern non-technical issues such as consumer understanding or economic effect, and particularly where the opinion advanced is in reality a judgment on the entire case, that procedural regularity can be questioned and the issue of substantial evidence be raised.

Thus, while Section 701 does not preclude determination of technical questions by competent experts rather than by lawyers or courts, it does not contemplate that unsupported conclusions, even by a government expert, shall control. As once put, the procedure envisages that the expert shall be on tap, not on top. Where decision rests on "opinion" evidence—even

on "judgment, training and experience" as a ritual formula—mere opinion alone is not substantial evidence. On any issue of reasonableness, for example, it is obvious that government experts, if their competence is established, may honestly express one opinion, and equally experienced and competent industry experts may with equal honesty express another. But unless the standard-making procedure is to revert to the ancient trial by compurgation or to a contest as to who can marshal the greatest number of experts with opinions, resort must be had in such cases to the underlying facts on which such opinions are based.

Two other things need be said on this point. On no theory of the law of evidence or the fundamental propriety of an administrative proceeding can the opinions of any witness, given merely by way of comment upon the fact testimony of others, be deemed to have any substantial probative value in negating the existence of the fact. It is doubtful whether there can properly be resort to opinion evidence except where the question is so technical that an ordinary man would not be qualified to draw conclusions from the facts presented. This would certainly be true on any such issue as to what was the common or usual name of a food product. To ascertain the name by which a food is known and labeled is not a complicated technical inquiry necessitating experts, but requires merely the reporting of simple facts. This, again, does not mean that the Department's technical staff may not exercise a judgment on technical data. It means that there must always be adequate data for judgment. Speculation even on technical questions is still speculation, and can play no proper part in law making on facts.

But hardly debatable is the contention—which has been so often advanced that it may sometimes have been true—that a government witness' opinion has been considered as substantial evidence even when numerous opposing witnesses testified to facts contradicting his opinion. In such circumstances, the unsupported opinion appears to be a hollow reed upon which to base an administrative determination and, if presented on a clear record, will undoubtedly draw judicial disapproval.

A somewhat related question of substantiality arises out of testimony concerning laboratory experiments. Here the usual charge is that what has been done is a scientific curiosity unrelated to commercial operation or problems. The issue is not one of personal qualification but, again, of fact. It exemplifies the broader question of the difference between contradicted and uncontradicted evidence. To a high degree, any fact asserted on the record, and neither challenged nor contradicted by other facts, may be accepted. But where there is controversy and contradiction, the task of decision turns on winnowing out the

fact from opinion or the true from the false. An experiment may be accurate. It may or may not be a proper analogue to commercial practice. These are two separate questions resting on different facts. Opinions on each issue may be helpful, but in the face of actual data they should not be controlling or regarded as substantial evidence. Thus a laboratory experiment may be highly illuminating. Yet where the record discloses that it departed radically from commercial practices, it is not substantial evidence as to the reasonableness of a regulation containing requirements founded upon such experiment.

Any determination as to what is substantial evidence means that testimony must be realistically evaluated. It is here that the lawyer is often puzzled by the apparent failure of some administrative officials to appreciate what any judge, and most juries, innately understand. The hearsay rule is not applicable to standard hearings. But this does not mean that anything presented at a hearing is substantial evidence. To offer one of many examples; on the issue whether a required fill had resulted in impairment of the quality of a canned product, testimony was presented summarizing the results of a survey by Food and Drug field inspectors. These officially identified gentlemen had called upon distributors and inquired whether the quality of what was currently being sold was poorer than what had formerly been sold. Most of those asked said, "No"; the tabulation was offered as evidence; and, in the face of conflicting direct testimony, made the basis for a proposed finding that quality had not been impaired. This is asking a lot of human nature. Without exploring the subtleties of the *res gestae* exception to the hearsay rule, or debating whether citizens always give honest answers to government inspectors, the absence of any opportunity to cross-examine such tabulated hearsay, secured under these circumstances, destroys its value as substantial evidence.

Occasionally found is the apparent acceptance of sheer speculation as substantial evidence. This takes the form of earnest testimony that if a particular practice should have a particular result, then it would be disadvantageous to the consumer. Cross-examination may reveal complete doubt as to whether the assumed result ever occurs. Yet this type of "if it happens, and I don't know whether it does happen" testimony is sometimes taken as substantial evidence that the results will happen, and used as the foundation for a regulation designed to prevent their occurrence.

All of these questions come into sharp focus on the controlling ultimate issue of what will promote honesty and fair dealing in the interest of consumers. Decision requires some facts as to what the consumer thinks, what her interests are, what are her prevailing concepts as to the identity and com-

position of foods, what might or might not cause confusion, and what she might or might not deem acceptable in a food product. This is the most elusive corner of the whole problem of substantial evidence in these proceedings. However competent technically, no matter how happy their individual experiences may have been, government chemists, bacteriologists, or other scientific experts are not *per se* qualified to answer these questions. By the same token, neither are canners or other food manufacturers. Trade facts concerning the distribution and expanding acceptance of a particular product are relevant to the issue but may not be controlling.

The collective noun, consumer, has content but not specific identity. Its range covers all sections of the country, all economic levels, all tastes and preferences, and presumably all standards of cooking. To impound the collective opinion of so vast a group necessitates either the use of informed experts on these specific matters or some survey technique. As previously noted, experts should carry no more weight than their experience and information. And substantial evidence is required. Individual housewives are not qualified to answer for a nation of consumers. Nor by any realistic standards can the testimony of organization representatives be always accepted as the equivalent of a poll of their membership. Seldom do they testify to anything that properly could be termed evidence. Too often the venturesome effort at cross-examination of these ladies reveals that they carry a broad mandate and that the authority and discretion delegated to them to speak for all American women has apparently no bounds. Occasionally they even assert knowledge of broad consumer views with respect to technical niceties first developed earlier in the hearings.

Qualified experts with wide knowledge of consumer preferences have been helpful. Yet often, if called without previous opportunity for inquiry, they candidly disclaim knowledge of consumer preferences on specific points. And the invitation to make a preliminary canvass often results in later argument about who underwrote the project, the objectivity of the method, and the acceptability of the evidence.¹⁷

Perhaps the answer lies in carefully organized opinion polls. These are costly, and the problems of formulating unloaded

¹⁷ There appears to be considerable reluctance to answer questions where the informant is told that the information may be produced in a governmental inquiry. Many people have a strange fear that this will bring down upon them representatives of the F. B. I. Others do not want to be put in the position of opposing the views of any governmental agency. Yet failure to state the purpose for which questions are asked is often fatal; and in one instance a letter survey made by a qualified nutritionist, on a confidential basis, was refused admission because the names of those who replied were not revealed. On the other hand, a more or less informal canvassing of consumer opinions by cherry packers was admitted.

questions and securing an adequate statistical base open a wide door for challenge. Yet without adequate direct canvassing of consumer preference, some crucial issues may in reality have to be resolved by unenlightened speculation—even by experts. Perhaps some type of poll can be devised which, while not conclusive, will still be helpful.¹⁸

* * *

* * * neither group should approach the problem as litigants. Government officials are not here dealing with malefactors whose practices endanger the public health. They are not policing or prosecuting, but carrying out delegated legislative functions. In doing so they are dealing with economic issues of great difficulty and of vital impact on those they affect. On its part, industry must understand that it is not being prosecuted by a regulatory agency but instead is being afforded a splendid opportunity to participate in the program which Congress has ordained.

D. JUDICIAL REVIEW OF ADMINISTRATIVE LEGISLATION

Now, granted the creation of federal administrative legislation, the lawyer will want to know under what conditions it may be attacked and defended in the courts; he will want to have some idea of the attitude of the courts in scrutinizing administrative rule making activities. On these problems, the following views of the Attorney General's Committee on Administrative Procedure should be exceedingly helpful:

VIEWS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE¹⁹

Until recently, judicial review of administrative regulations could be had only collaterally, in actions brought to enforce them, in injunction suits to prevent their enforcement, in declaratory judgment proceedings, in habeas corpus actions to obtain release from arrests for violation, or in private actions in which the results turned upon the effect of regulations. In such an action, the issue may be either the validity of a regulation as a whole or the legality of applying it to the person who is challenging it, in the same way that an attack upon a statute may involve either the constitutionality of the measure as a whole or the constitutionality of applying it to a particular party.

¹⁸ It is interesting to observe that in two consumer preference studies, to be conducted by the Bureau of Agricultural Economics under the Research and Marketing Act of 1946, on potatoes and citrus fruits, scientific door-to-door polls of housewives and hotel and restaurant buyers are scheduled with a force of 4,000 investigators. See *Food Field Reporter*, October 13, 1947, p. 21. * * *

¹⁹ *Administrative Procedure in Government Agencies*, Sen. Doc. No. 8, 77th Cong. 1st Sess., pp. 115-119 (1941).

Where the legality of applying a regulation to a particular objector is in question, the issue is comparatively narrow. The relevant evidence relates to the business or transactions or affairs of an individual or corporation; the pertinent legal question is the applicability of the statute under which the regulation was promulgated to the facts thus revealed. The decision will be the kind courts are accustomed to render in regard to many matters that come before them.

Where the validity of the entire regulation is in question in one of the types of actions above enumerated, the central issue is one of law, involving the relation of the regulation to the governing statute or occasionally to the Constitution. Evidence will be necessary to the solution of the issue only insofar as the facts bearing upon the legality of the regulation are not within the knowledge of the court—just as, in constitutional cases, the facts which surround the constitutionality of a statute require presentation in evidence or briefs to the extent that they may not be known to the court. Conceivably, a legal argument may be all that is necessary to aid in determining the validity of a regulation, as of a statute.

Occasionally, as is also the case when the constitutionality of a statute is in issue, a careful presentation of facts that are not of common knowledge may be necessary to illuminate the relation between a challenged regulation and the legal authorization for it. The relation between safety of operation and a regulation requiring power reverse gears on locomotives is obscure until it is revealed that a reverse gear serves not only to back the locomotive but also to check it when the train is going forward and that it acts in certain ways under certain conditions. Similarly, the relation between a required statement on the label of a food and the statutory evil of misbranding becomes clear only when it is learned what consumers in fact understand from a label which omits the statement. Judicial review of the validity of administrative regulations in the types of actions noted above may consequently involve examination into the facts bearing upon the regulations, in order to develop the connection, or lack of it, between them and the statutory authorization.

In some instances in which administrative regulations have been challenged, the administrative agencies have undertaken to defend by bringing before the courts a large part of the information upon which they have acted. When the Secretary of Agriculture's definition of "sausage" under power given him by the Meat Inspection Act was challenged, persons in the meat industry, and experts in the subject, were brought in to testify to trade practice and opinion, such as they had previously revealed to the Department.

In none of these instances of judicial review, however, has it been the task of the court to retrace the entire investigation and reasoning by which an administrative regulation was arrived at. A judgment upon the rational relation of the regulation to the statute has been all that has been sought and instances of the failure of the judiciary to give due weight to the administrative judgment underlying a regulation are not numerous.

Some of the recent statutes conferring rule-making power, however, as has been stated earlier in this chapter, provide for a much more detailed judicial review of certain administrative regulations than that just described. They require that the regulations in question be based upon findings of fact; that these, in turn, be based upon evidence made of record at a hearing; and that a reviewing court set aside a regulation not only for failure of the findings to support it, but also for failure of a finding to be based upon substantial evidence in the record. Review by the courts is had in statutory proceedings which may be instituted within a prescribed time by parties aggrieved by regulations and which result in a certification of the administrative record to the court. A judgment adverse to a regulation results in setting it aside.

In these review proceedings a court is required not merely to pass upon the presence of a rational relationship between a regulation and the governing statute, but to judge the fundamental soundness of the details of the administrative reasoning process. The regulation does not speak for itself, with a limited amount of evidence or argument to aid in judging it; the entire administrative record must be examined.

The full significance of this novel type of judicial review becomes apparent only when the characteristics of the problems to be resolved in regulations are considered. A leading characteristic is the discretion required for their solution. In an ordinary trial the question is whether the facts bring the case within a rule or principal of law or not. The issues can be framed as issues of fact, and findings based upon evidence can be made. The issues are always of limited scope, relating to the particular circumstances or transactions, and the evidence bearing upon them can be incorporated into a record.

The situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies. For example, whether railroads, air lines, or steamship companies shall be required to install expensive safety devices; what shall be the nature of the elaborate accounting systems prescribed for communications companies or other utilities; what shall be the standards of identity and quality for foods; what shall be the definition of improper

practices by trust officers of national banks—these and a thousand other determinations which must be made in administrative regulations involve important choices of policy. Such choices must be made in the light of facts; but the chief issues are not factual. They relate either to the proper balancing of objectives—safety of transportation as against minimizing the expenditures of transportation companies; conformity to the idea of consumers as against freedom for manufacturers to follow practices of their own choosing; and the like—or to a choice of methods to achieve given objectives, such as the best way to produce an adequate record of the financial affairs of certain corporations or the most workable procedure for judging the fitness of applicants for certain types of licenses.

It is true that the discretion thus exercised in administrative rule making operates within statutory limits and is not unfettered. Nevertheless, within these limits the important questions always are what is desirable or what is workable in order to carry out the directions contained in the statute. It is possible, though difficult, in a proceeding involving discretion to specify questions of fact upon which information is needed; to gather record evidence bearing upon them, to make findings with regard to them; and then to arrive at final conclusions in the light of these findings as well as of the relevant considerations of policy. This is the method of proceeding which is imposed by some of the recent statutes that call for the more searching type of judicial review. The possible advantages and disadvantages of requiring this administrative procedure have already been discussed.

In considering now whether judicial review of a detailed kind is desirable, attention should be paid to the nature and complexity of the questions of fact involved. To take a comparatively simple example, suppose the problem to be that of prescribing regulations specifying the maximum amount of a particular type of poisonous spray residue to be permitted upon raw apples shipped in interstate commerce. The following questions would seem to have a bearing upon the final result: (a) the quantity of the particular poison, consumed within, say, a year, that will have a definitely harmful effect upon ordinary individuals; (b) the proportion of individuals that would be similarly affected by smaller quantities, and what quantities; (c) the quantity of unpeeled apples, and hence of poison upon apples consumed by individuals in, say, a year; (d) the quantity of the same poison consumed by the same individuals upon other products in the same time; (e) the physical practicability and (f) the cost of reducing the amount of spray residue to various quantities and of eliminating it entirely before the apples are shipped; (g) the probable distribution between consumers and growers of the added cost incident to the removal

of spray residue, in the light of (h) the effect of higher prices upon consumption and (i) the countereffect of knowledge by consumers that apples carry poison.

The evidence relating to these questions would have to be sought in a variety of quarters. Questions (a) and (b) are medical, and information regarding them would have to be derived from observation and experiment. Questions (c) and (d) relate to the habits of people and would have to be obtained by direct inquiry or from statistics regarding the distribution of apples or both. Question (e) presents a question of chemistry, the answer to which depends upon experiment. Question (f) presents a relatively simple economic problem, resolvable in terms of the prices, wages, and the like, that would have to be paid for the labor, equipment, and supplies required in the process of removing the residue. Testimony and statistics regarding these could readily be obtained. Questions (g), (h), and (i) involve a complex economic problem which is probably beyond definite solution by means of available knowledge. Suggestive studies might, however, be made, and opinion evidence might be obtained.

If evidence upon all of these questions were duly incorporated into a record and findings were made with respect to each point, the question of whether it would be useful to have a court review the evidence and the findings would depend upon the ability of the court to supply a corrective to possible gross error. Under the statutes, a finding is to be disregarded by the court only if there is no substantial evidence to support it. One crucial point is whether the courts would be willing to regard as substantial the opinion evidence and the possibly somewhat speculative and partial data upon which some of the findings would necessarily rest—especially the economic findings and findings relating, for example, to consumer preferences or reactions to food products and their labels. Those courts mindful of the reasons for entrusting such determinations to administrative agencies, of course, would regard such evidence as possessing weight. Some experience with judicial review, however, points the other way.

The courts, in any event, in judging such evidence would not be making use of their expertness at weighing judicially admissible evidence and trying the facts in judicial actions; for the facts here involved differ very greatly from those which courts ordinarily try. Like the ultimate conclusions embodied in regulations, they are general, not limited to particular situations. Not what Consumer A thinks or thought on a particular occasion, but what consumers generally think; not the hazard involved in running a locomotive in a particular manner over a given stretch of track, but the likelihood of accidents from running locomotives possessed of equipment of a given type every-

where; not whether A or B was poisoned by lead or arsenic on apples, but whether people generally are likely to be poisoned by a certain amount of spray residue on apples—these are the kind of factual issues that must be resolved by findings in rule making.

* * *

CASE MATERIALS

Let us see just how the courts have applied some of these judicial standards in the context of particular fact situations:

PACIFIC STATES BOX & BASKET CO. v. WHITE²⁰

Supreme Court of the United States, 1935
296 U. S. 218, 80 L. ed. 138, 56 S. Ct. 159

Mr. Justice BRANDEIS delivered the opinion of the Court.

This suit was brought in the federal court for Oregon, in May, 1934, to enjoin enforcement of an order of the Department of Agriculture of that State, dated May 3, 1933, entitled "Standard Containers for Fruits and Vegetables." The plaintiff, Pacific States Box & Basket Company, is a California corporation which manufactures there fruit and vegetable containers. The defendants are the Director of Agriculture and the Chief of the Division of Plant Industry of Oregon. The jurisdiction of the District Court was invoked both on the ground of diversity of citizenship and on the ground that the order, and the statutes purporting to authorize it, violate rights of the plaintiff guaranteed by the Federal Constitution. The case was heard upon plaintiff's motion for a preliminary injunction and defendants' motion to dismiss the bill on the ground that it does not state facts sufficient to entitle the plaintiff to relief. The court denied the injunction and dismissed the bill. 9 F.Supp. 341.

Oregon Code of 1930, §§ 18-2902 and 18-2903, as amended by Oregon Laws 1931, c. 136, and 1933, c. 225, authorize the Chief of the Division of Plant Industry, after investigation and public hearing and subject to the approval of the Director of Agriculture, to fix and promulgate "official standards for containers of horticultural products" "in order to promote, protect, further and develop the horticultural interests" of the State. After a standard has been prescribed, these statutes make it unlawful for anyone to pack for sale or transport for sale, or sell, the article in a container unless it conforms to the standard. They make any violation of the order a misdemeanor, and charge the Director with the duty of enforcement.

The order challenged, so far as it prescribes containers for raspberries and strawberries, is:

²⁰ The footnotes have been omitted.

"As provided for in sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, a public hearing was held in Portland, Oregon, on the date of April 15, 1933, to consider standard containers for fruits and vegetables. Containers for the following fruits and vegetables were considered and recommended:

RASPBERRIES

Crate—24-pint hallocks, . . . Size of hallock, $2\frac{1}{2} \times 5\frac{1}{4} \times 5\frac{1}{4}$ inches outside measurements, bottom set up $\frac{3}{4}$ inch, inside depth $1\frac{1}{4}$ inches.

STRAWBERRIES

Crate—24-pint hallocks, . . . Size of hallocks, $2\frac{1}{2} \times 4\frac{3}{8} \times 4\frac{3}{8}$ inches outside measurements, bottom set up $\frac{3}{4}$ inch depth $1\frac{3}{4}$ inches.

. . . the above-mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material."

A hallock is a type of rectangular till box with perpendicular sides and a raised bottom. It is usually made of rotary cut veneer, taken directly from spruce logs; but is sometimes made of paper or other material.

The plaintiff manufactures a type of container other than hallocks. Its type, which is also used for raspberries and strawberries, is known as tin-top or metal rim. It differs from the hallock both in shape and construction. In shape, it is more like a cup; its sides slope outward; and it has not the raised bottom. This cup is made from two thin strips of wood crossing each other to form the bottom of the container and then bent upward to form the sides, reinforced with a narrow metal strip to insure protection of the cup and its contents, as well as to insure uniformity of cubic measure. The plaintiff has for years sold a part of its product of tin-top cups to dealers in Oregon, for ultimate use as containers for raspberries and strawberries to be packed there.

The bill alleges "that the effect" of the order is to prevent the sale by plaintiff for use in Oregon of "the metal top variety of containers or cups with the solid bottom"; "because dealers who formerly purchased such baskets from Plaintiff have been warned by officials . . . that they would not be allowed to sell strawberries or raspberries in any container" other than that prescribed; that it has no facilities for manufacturing hallocks; and that, because of the expense of installing the requisite machinery and the cost of transporting appropriate sup-

plies to its plant, it is impracticable for it to arrange to make hallocks.

The claim is that, since the order prescribed hallocks as the only permissible type of container, its necessary effect is to exclude containers of the plaintiff's manufacture from use in Oregon, and, therefore, the order violates its rights: (a) Under the due process clause of the Fourteenth Amendment, because the order is arbitrary, capricious, and not reasonably necessary for the accomplishment of any legitimate purpose of the police power; . . . The defendants insist that the order is an appropriate exercise of the police power of the State; . . . We think the defendants are right.

The power of a State to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See *Turner v. Maryland*, 107 U. S. 38, 51-54, 27 L. ed. 370, 2 S. Ct. 44. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended.

Plaintiff does not question the reasonableness of the standard so far as it prescribes the capacity of the box or basket. Its challenge is directed solely to the fixing of the dimensions and the form of the container. But to fix both the dimensions and the form may be deemed necessary in order to assure observance of the prescribed capacity and to effect other purposes of the regulation. It may be that in Oregon, where hallocks have long been in general use, buyers at retail are less likely to be deceived by dealers as to the condition and quantity of these berries if they are sold in containers of the prescribed form and dimensions. It is said that there are 34 other styles or shapes of berry baskets in use somewhere in the United States. Obviously, a multitude of shapes and sizes of packages tends to confuse the buyer. Furthermore, the character of the container may be an important factor in preserving the condition of raspberries and strawberries, which are not only perishable but tender. A shallow container, like the hallock prescribed, may conceivably better preserve these fruits than the deeper cup which the plaintiff manufactures. A container with perpendicular sides, like the hallock, may conceivably preserve them better than a metal-rim cup with outward sloping sides. And, since the containers are to be packed and shipped in crates of 24, the berries may conceivably be better stowed, where the fruit basket has the bottom set-up peculiar to the hallock, than if it had the flat bottom of the plaintiff's metal-rim cup. Con-

siderations of this nature led the Colonies, the individual States, and Congress to prescribe for many articles not only the capacity, but the size and form of containers.

Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted.

* * *

. . . When such legislative action "is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209, 79 L. ed. 281, 55 S. Ct. 187. The burden is not sustained by making allegations which are merely the general conclusions of law or fact. See *Public Service Commission v. Great Northern Utilities Co.*, 289 U. S. 130, 136, 137, 77 L. ed. 1080, 53 S. Ct. 546. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth. See *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 72 L. ed. 357, 48 S. Ct. 174. *O'Gorman & Young v. Hartford Fire Insurance Co.* 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130; *Hege-man Farms Corporation v. Baldwin*, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7. . . .

It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of [a] legislature; and that where the regulation is the act of administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legis-

lature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241 and *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Insurance Co., v. Hyde*, 275 U. S. 440, 447, 72 L. ed. 357, 48 S. Ct. 174. Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. . . .

* * *

Affirmed.

QUAKER OATS CO. v. FEDERAL SECURITY ADMINISTRATOR

Circuit Court of Appeals, Seventh Circuit, 1942, 129 F. 2d 76

MAJOR, Circuit Judge. This is a petition for review of respondent's order, entered May 26, 1941, promulgating regulations fixing and establishing definitions and standards of identity for "farina" and "enriched farina" and numerous related flour mill products.

The authority relied upon by respondent is contained in Section 341, Title 21, U. S. C. A., entitled "Definitions and Standards for Food." (Section numbers used in this opinion refer to U. S. C. A.) The section, so far as here material, provides: "Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container." * * *

The Administrator, after notice and hearings participated in by members representing the pertinent industry, as well as

consumer representatives, adopted findings of fact and concluded on the basis thereof that the regulations included in his order would promote honesty and fair dealing in the interest of consumers. Then follows the regulations fixing standards for a large number of flour products, as well as those involved in this proceeding, namely "farina" and "enriched farina." The former, designated as Reg. 15.130, defines farina as the food prepared by grinding and bolting clean wheat, other than durum wheat and red durum wheat, to a prescribed fineness, with bran coat and germ removed to the extent that the percentage of ash in the final product, calculated to a moisture free basis, does not exceed .6 percent. The latter, designated as Reg. 15.140, defines enriched farina as conforming to the standard fixed for farina, except that it contains prescribed minimum quantities of vitamin B₁, riboflavin, nicotinic acid, and iron. Enriched farina, under the Administrator's standard, may contain as optional additional ingredients vitamin D, calcium, wheat germ, and disodium phosphate.

While there is some disagreement as to the contested issues involved, we think they may be fairly summarized by petitioner's contention, disputed by respondent, that each of the regulations is unreasonable, that they do not promote honesty and fair dealing in the interest of consumers, and are not supported by substantial evidence. Furthermore, it is contended by petitioner that respondent was without authority to promulgate a regulation concerning enriched farina, which had not been marketed theretofore, that the notice of the hearing did not purport to authorize the reception of evidence concerning such standard and that, as a matter of fact, evidence was not received pertinent thereto. It is also contended with respect to both standards that respondent, in administering the Act, has reached an unconstitutional result.

The basis upon which we think this case must be decided makes it unnecessary to enter into a discussion as to the character of notice given by respondent. It is sufficient to state that while petitioner's contention is not without merit, yet we are of the view that its participation in the hearings, both the original and the adjourned, were such as to preclude it from successfully invoking such issue. Likewise, we think it is unnecessary to enter into a discussion of petitioner's contention that the findings are without substantial support. For the purpose of this opinion (with certain exceptions noted hereinafter) we accept them.

It is, therefore, sufficient to summarize the findings as made by respondent. A major portion of the hearings was devoted to the numerous grades of flour and only a minor portion to farina. As a consequence, most of the findings, strictly speaking, pertain to flour, which petitioner contends have no rel-

evancy to farina and were, therefore, improperly included in the record. It must be conceded, we think, that there is such a close relationship between flour or, at any rate, some of the grades thereof, and farina, that it would be impractical, if not impossible, to consider the evidence and findings concerning the latter without giving consideration to the former.

Farina is a product obtained by grinding wheat and separating the bran coat and germ of the grain from the endosperm. It consists essentially of endosperm in particles larger than permissible in flour, the size of the particles being the principal characteristic distinguishing the product from flour. In fact, it corresponds substantially to a fine grade of white flour known as "Patent Flour." It is used as a breakfast food, as an ingredient of macaroni products and extensively as a cereal food for children.

It was found that the removal of the bran coat and germ in the manufacture of flour and farina eliminates those parts of the wheat which are richest in vitamins and minerals. It was also found there exists a serious and widespread nutritional deficiency in children, as well as in adults, of vitamin B₁, riboflavin, nicotinic acid, iron, calcium and vitamin D. These elements are available in synthetic compounds and are suitable for the enrichment of flour and farina. It was further found that vitamin D and calcium are used singly as enrichments of flour and farina, but consumer education has generally recommended dairy products as the most desirable source of the calcium and milk as the product most suitable for enrichment with vitamin D. It was found, however, that the addition of D and calcium as optional ingredients in enriched flour and enriched farina would be useful for those who consume insufficient dairy products.

It was found that manufacturers have recently placed on the market flours and farinas enriched with one or more of these nutritional elements.²¹ The composition of these enriched products varies widely, so it is found, and unless a standard limiting the kinds and amounts of enrichment is adopted, the manufacturers' selection of nutritional elements is likely to lead to a great diversity of enrichments, both quantitative and qualitative. Such diversity would tend to confuse and mislead consumers as to the relative value and need of the several nutritional elements, and would impede rather than promote honesty and fair dealing in the interest of consumers. Indiscriminate enrichment with vitamins and minerals would tend to confuse and mislead consumers by giving rise to conflicting claims regarding the beneficial effects of various vitamins and

²¹ This finding must refer largely to flours, as the record discloses only two farinas to which vitamins have been added.

minerals, and would be likely to lead to the impression on the part of consumers that a single article of food, so enriched, would meet all nutritional needs.

It was also found that, pending experience with the use of enriched flour and enriched farina, consumer education and understanding would be facilitated by restriction of enrichment with respect to the ingredients and, as to farina, the minimum amounts of such ingredients. The findings further recite that flour and farina enriched with vitamins and minerals have not acquired common or usual names, but that such products may be accurately designated as "enriched flour" and "enriched farina."

Upon the basis of such findings, respondent concluded that it would "promote honesty and fair dealing in the interest of consumers" to adopt the standards of identity for farina and enriched farina embodied in the regulations in controversy. The record discloses certain other evidence not specifically covered by the findings, but not inconsistent therewith, to which we briefly refer.

Petitioner has, since April, 1932, sold its product, labeled on the front panel of the package, "Quaker Farina Wheat Cereal, enriched with vitamin D," or "Quaker Farina enriched by the Sunshine Vitamin." On the back panel of the package is the following description: "contains 400 U.S.P. units of Vitamin D per ounce, supplied by approximately the addition of $\frac{1}{5}$ of 1 per cent irradiated dry yeast."

During such period it has sold millions of packages annually and its product is of national reputation.

Vitamin D functions in regulating the metabolism of calcium and phosphorous in the body and is, therefore, concerned with the proper formation of bones and teeth. It is recognized as especially beneficial in the infant and growing child as a preventive and therapy of rickets and the building of strong bones and teeth. It is also an essential vitamin for adults. There is medical testimony to the effect that of all the known vitamins, it is the one most deficient in normal diet and should, therefore, be supplied in foods which are consumed regularly by the great mass of population, particularly those in the low income groups. While the Administrator found that milk was the most appropriate carrier for vitamin D, it is not disputed but that farina is also a proper carrier. Vitamin D in nature is found almost exclusively in sunshine and certain fish livers which are unavailable to humans in the normal diet. Therefore, as we understand, this vitamin is deficient in ordinary food products except when artificially supplied.

Thus, we have a situation where farina, with the addition of vitamin D, as manufactured and marketed by petitioner, is ad-

mittedly a wholesome and healthful product (it is admitted in respondent's brief that vitamin D is a beneficial substance), and that it has been sold to millions of consumers, without deception, fraud or misrepresentation of any kind or character. As already pointed out, the regulations in question permit the manufacture and sale of plain farina and enriched farina. The regulation as to the former, in effect, prohibits petitioner from the sale of farina to which vitamin D has been added, as has long been its practice. The regulation as to the latter permits the use of vitamin D as an optional ingredient in connection with other vitamins, the use of which is mandatory.

Respondent criticizes, without merit we think, petitioner's treatment of the standards as separate and distinct. It is said they must be considered together, or, at any rate, with reference to each other. Such consideration, however, as we view the matter, furnishes little, if any, assistance to respondent's cause.

This brings us to what we regard as the heart of the controversy, embracing the issue as to respondent's authority to promulgate the regulations in dispute. Closely allied therewith is the question as to the reasonableness of the regulations, even if found to be within the authority conferred by the Act.

We assume there could be no dissent from the proposition that an administrative agency has only such authority in the administration of a Congressional enactment as is expressly conferred, or as may be reasonably implied. Prior to discussing the matter of respondent's authority, we again refer briefly to the findings of fact by which we are bound, if supported by substantial evidence. See 371(f) (3). As already noted, we accept the findings with certain exceptions, one of which may, or may not, be a finding, viz., that the regulations in suit will promote honesty and fair dealing in the interest of consumers. We assume from respondent's argument that this is regarded as a finding of fact, notwithstanding its being labeled as a conclusion and predicated upon the facts as found. Other than this labeled conclusion, the only reference in 92 findings to honesty and fair dealing is found in connection with the discussion as to the diversity of products of various manufacturers which, it is found, would "tend to confuse and mislead consumers * * * and would impede rather than promote honesty and fair dealing in the interest of consumers." The conclusion that the regulations will promote honesty and fair dealing comes closer, in our judgment, to being one of law than of fact. If so, we are not bound to accept it. On the other hand, if it be considered as a finding of fact, we are of the view that it is without substantial support.

All of the findings, labeled as such, as well as respondent's argument before this court, are bottomed upon the premise

that the standards in controversy are authorized because they are in the interest of the consumer. As stated in his brief: "The real issue, of course, is whether the requirements of the regulation are reasonably related to the promotion of consumers' interests. * * *"

A study of the record leaves no room for doubt but that the hearing revolved largely around consumer interest as it related to health. In referring to the ingredients of enriched farina, it is stated in respondent's brief: "They are essential to the health and well being of our nation." In support of the regulations it is also suggested that they will prevent confusion among consumers as to their nutritional needs. In this regard, respondent states: "* * * Indiscriminate enrichment with vitamins and minerals would tend to confuse and mislead consumers by giving rise to conflicting claims regarding the beneficial effects of various vitamins and minerals and would be likely to lead to the impression on the part of consumers that a single article of food so enriched would meet all nutritional needs. * * *"

It is still further suggested that the regulations will promote consumer understanding of the relative value of enriched and natural foods.

As is shown by the statutory provision quoted heretofore, the Administrator is authorized to promulgate regulations fixing standards whenever, in his judgment, "such action will promote honesty and fair dealing in the interest of consumers." Thus, his action in the interest of consumers is expressly limited to the promotion of honesty and fair dealing in their behalf.

That the promotion of honesty and fair dealing was intended by Congress to mean something other than the promotion of the consumers' health is plainly ascertainable from a study of the Act. Likewise, it is clear that action was not authorized merely to avoid confusion on the part of consumers, nor to educate the public as to dietary requirements. If Congress had so intended, it would, no doubt, have employed the appropriate language. While there may be some relevancy between the promotion of health and that of honesty and fair dealing, they certainly are not synonymous terms. Injury to health does not necessarily follow from dishonesty and unfair dealing in food products, and neither does health improvement necessarily follow from honesty and fair dealing.

That Congress used the words "honesty and fair dealing" in their ordinary sense, we think there is little room to doubt. The general rule that legislative words must be so construed, is strengthened, so we think, by a reading of the Act which became a law June 25, 1938, entitled "Federal Food, Drug, and Cosmetic Act." It is divided into seven sub-chapters, including

sub-chapter 4 relating to food, 21 U. S. C. A., § 341 et seq., the one now under consideration. Under this sub-chapter, Section 341 defines the Administrator's authority for the fixing of standards. In addition to the language quoted heretofore from this section, it contains a clause, as follows: "* * * In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *"

In other words, telling the consumer the truth as to optional ingredients is declared to be in the promotion of honesty and fair dealing. The law makers evidently did not contemplate the dietary requirements of consumers, the likelihood of confusion relative thereto, or their need for education as constituting a basis for the promotion of honesty and fair dealing.

Section 342 is entitled "Adulterated Food" and describes the conditions under which a food shall be deemed to be adulterated. It contains such designations as poisonous or deleterious to health, filthy, putrid, decomposed, substitution and concealment. Section 343 is entitled "Misbranded Food" and Paragraphs (a) to (k), inclusive, describe such foods. Terms are employed such as false or misleading label, offering for sale under another name, imitation of another food, misleading container, and artificial flavoring. Paragraph (g) describes as misbranded a food represented as one for which a standard has been prescribed unless (1) it conforms to such definition and standard, and (2) its label bears the names specified in the standard and, in so far as required by the regulation, the name of any optional ingredients. It will thus be observed that the truth as to a food for which a standard has been fixed permits it to escape the indictment of being misbranded.

If defendant's contention be accepted that he has the authority to fix a standard as to the ingredients of a food which is truthfully labeled, then it would seem to follow that the statute indicts as misbranded that which, as a matter of fact, is correctly branded. This is the tortious result achieved by attempting to promote a dietary standard rather than honesty and fair dealing, as the statute requires. The result is all the more obnoxious in the instant situation where, as already pointed out, the consumer is adequately and truthfully informed as to petitioner's product which, in addition, is in no way deleterious to the health of the consumer.

Our discussion, designed to show that a standard food, although in the interest of the consumer, does not meet the test of honesty and fair dealing, is further strengthened by a study of sub-chapter V, 21 U. S. C. A. § 351 et seq., relating to drugs.

As noted, this is a part of the same Act and enacted at the same time. While we make no attempt to construe this sub-chapter, a study of it readily discloses that the intention was to prohibit the sale of drugs under false, misleading and deceptive labels. In other words, it was sought to protect the consumer by requiring that he be truthfully informed as to the contents of the drug offered for sale. Illustrative is Section 352 (d) which removes habit-forming drugs from the misbranded class where the label correctly bears the name and quantity of the ingredient, with the warning that it may be habit-forming. It seems unreasonable to think that Congress intended to apply the odious term "misbranded" to a food product correctly labeled and admittedly wholesome and beneficial, and permit drugs to escape such designation by the means of a truthful and honest label.

The findings and argument predicated upon the possibilities for confusion of consumers, in optional partial enrichment, carry little, if any, weight. There was no evidence in support of such possibilities and they are entirely speculative and conjectural. As was said in *Federal Trade Commission v. Raladam Company*, 283 U. S. 643, 653, 51 S. Ct. 587, 592, 75 L. Ed. 1324, 79 A. L. R. 1191: "* * * All this was left without proof, and remains, at best, a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission."

Looking at the realities of the situation, it is difficult to perceive how consumers' confusion, resulting from the truth as to the ingredients of a product, could support an action to promote honesty and fair dealing.

Furthermore, we should think that a product manufactured in accordance with the regulations in suit would tend to increase rather than retard confusion. This is especially true as to enriched farina. No such product has been sold heretofore under that designation. The manufacturer will be required only to label it "enriched farina" unless the option to add vitamin D is exercised, in which case such addition must be stated. How the ordinary consumer will be informed so as to avoid confusion as to what is meant by enriched farina, its contents, or the benefits to be expected from its use, is a mystery which we are not able to fathom. How the contention that confusion is likely to result from a product, such as petitioner's, which truthfully informs the consumer as to what he is buying, can be reconciled with the contention that a product sold as enriched farina, without any further description, will lessen or avoid confusion, is beyond our comprehension.

Another unreasonable and, we think arbitrary result of these regulations is that the petitioner is precluded from adding vita-

min D to its product, as it has done for many years and, at the same time, permitted to add vitamin D as an optional ingredient in enriched farina. We say it is unreasonable for the reason that no claim is made of any relationship or co-action between vitamin D and the other ingredients required in enriched farina. As a result, the consumer who is deficient in vitamin D only, as is often the case, must buy a product containing vitamins and ingredients which he does not need, or does not want, in order to obtain the benefit of vitamin D. Another unreasonable result, so we think, is that by the exclusion of vitamin D from petitioner's product, many people will be deprived of this admittedly essential vitamin. This result is none the less real by reason of the suggestion that milk is the most appropriate carrier of vitamin D, and that the majority of consumers (infants and children) who use petitioner's product are also large consumers of milk. There might be merit to this suggestion but for the fact that vitamin D is not a substantial ingredient of milk or any other natural food product in ordinary use. Thus, in order to obtain this essential vitamin in milk, it must be added thereto. Looking at the realities of the situation, we think this would mean that very few of the so-called low income group would receive sufficient vitamin D. Too many of them, no doubt, are without the necessary amount of milk, much less milk to which this vitamin has been added. So, as a final result, the regulations are responsible for a situation whereby a consumer is precluded from obtaining vitamin D alone in connection with farina; he may get it in connection with enriched farina at the option of the manufacturer, or he may get it with his milk, provided he possesses the foresight to see that it is added thereto.

Respondent relies strongly upon *United States v. Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, wherein the court sustained the validity of an act which prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream. We think this case furnishes respondent's position little, if any, support. The court, in commenting upon the Congressional hearings, on page 149 of 304 U. S., page 781 of 58 S. Ct., said: "* * * Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public."

And again, on page 151 of 304 U. S., page 783 of 58 S. Ct., it stated: "Here the prohibition of the statute is inoperative unless the product is 'in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed.' * * *"

As these quotations indicate, the court was considering legislation concerning a product which Congress concluded was

injurious to health and a fraud upon the public. It was pointed out that the inferior product was indistinguishable from pure milk "thus making fraudulent distribution easy and protection of the consumer difficult." In the instant situation, however, there is nothing about the appearance of the product facilitating fraud upon the consumer. True, as the record discloses, plain farina, petitioner's farina and enriched farina are indistinguishable in appearance and taste. Petitioner's product, however, is in no sense a substitution, an imitation, or injurious to health. Therefore, if the condemning language of the *Carolene* case is applicable to petitioner's product, which we think it is not, it is also applicable to plain farina and enriched farina. So far as appearance and taste are concerned, there is no more likelihood of the consumer being deceived or confused as to petitioner's product than as to either of the others. Furthermore, the court in the *Carolene* case was dealing with the power of Congress, while here we are considering the authority which Congress has conferred upon the Administrator, and the reasonableness of this action.

Hebe Company v. Shaw, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255, is also relied upon by respondent. This case was cited and relied upon in the *Carolene* case, 304 U. S. page 148, 58 S. Ct. page 781, 82 L. Ed. 1234, and, we think, is likewise distinguishable. The element of fraudulent substitution was present in both cases.

We have not overlooked respondent's argument that courts will not substitute their judgment for that of an Administrative Agency on the wisdom or expediency of a determination within its jurisdiction. There is no occasion to cite or comment upon cases cited in support of the argument. We do not take issue—in fact, we agree. The rule, however, is of no benefit to respondent in the instant situation because, as we have endeavored to show, the regulations, while purporting to be in the interest of consumers, do not promote honesty and fair dealing in their behalf. On this statutory requirement, essential to respondent's authority to act, the record is wholly deficient. In view of this situation, the action of respondent, in promulgating the regulations in controversy, was beyond his statutory authority. Such being the case, they must be set aside. It is so ordered.

**FEDERAL SECURITY ADMINISTRATOR v.
QUAKER OATS CO.**

Supreme Court of the United States, 1943
318 U. S. 218, 87 L. ed. 724, 63 S. Ct. 589

Mr. Chief Justice STONE delivered the opinion of the Court.
The Federal Security Administrator, acting under §§ 401 and

701(e), of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1046, 1055 (21 U. S. C. §§ 341, 371), promulgated regulations establishing "standards of identity" for various milled wheat products, excluding vitamin D from the defined standard of "farina" and permitting it only in "enriched farina," which was required to contain vitamin B₁, riboflavin, nicotinic acid and iron. The question is whether the regulations are valid as applied to respondent. The answer turns upon (a) whether there is substantial evidence in support of the Administrator's finding that indiscriminate enrichment of farina with vitamin and mineral contents would tend to confuse and mislead consumers; (b) if so, whether, upon such a finding, the Administrator has statutory authority to adopt a standard of identity, which excludes a disclosed non-deleterious ingredient, in order to promote honesty and fair dealing in the interest of consumers; and (c) whether the Administrator's treatment, by the challenged regulations, of the use of vitamin D as an ingredient of a product sold as "farina" is within his statutory authority to prescribe "a reasonable definition and standard of identity."

Section 401 of the Act provides that "Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity * * * In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label." By § 701(e) the Administrator, on his own initiative or upon application of any interested industry or a substantial part of it, is required to "hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by" § 401. At the hearing "any interested person may be heard." The Administrator is required to promulgate by order any regulation he may issue to "base his order only on substantial evidence of record at the hearing," and to "set forth as part of his order detailed findings of fact on which the order is based."²²

Any food which "purports to be or is represented as a food for which a definition and standard of identity has been pre-

²² As enacted, the Act vested the foregoing powers in the Secretary of Agriculture. By §§ 12 and 13 of Reorganization Plan No. IV, 54 Stat. 1234, 1237, approved April 11, 1940, the Federal Food and Drug Administration and all functions of the Secretary of Agriculture relating thereto were transferred to the Federal Security Agency and the Federal Security Administrator.

scribed" pursuant to § 401 is declared by § 403(g) to be misbranded "unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients * * * present in such food." The shipment in interstate commerce of "misbranded" food is made a penal offense by §§ 301 and 303. "In a case of actual controversy as to the validity" of an order issuing regulations under § 401 any person "adversely affected" by it may secure its review on appeal to the Circuit Court of Appeals for the circuit of his residence or principal place of business. On such review the findings of the Administrator "as to the facts, if supported by substantial evidence, shall be conclusive." § 701 (f) (1), (f) (3).

After due notice²³ and a hearing in which respondent participated, the Administrator by order promulgated regulations establishing definitions and standards of identity for sixteen milled wheat products, including "farina" and "enriched farina." Regulation 15.130 defined "farina" as a food prepared by grinding and bolting cleaned wheat, other than certain specified kinds, to a prescribed fineness with the bran coat and germ of the wheat berry removed to a prescribed extent. The regulation made no provision for the addition of any ingredients to "farina." Regulation 15.140 defined "enriched farina" as conforming to the regulation defining "farina," but with added prescribed minimum quantities of vitamin B₁, riboflavin,²⁴ nicotinic acid (or nicotinic acid amide) and iron. The regulation also provided that minimum quantities of vitamin D, calcium, wheat germ or disodium phosphate might be added as optional ingredients of "enriched farina," and required that ingredients so added be specified on the label. In support of the regulations the Administrator found that "unless a standard" for milled wheat products "is promulgated which limits the kinds and amounts of enrichment, the manufacturers' selection of the various nutritive elements and combinations of elements on the basis of economic and merchandising considerations is likely to lead to a great increase in the diversity, both qualitative and quantitative, in enriched flours offered to the public. Such diversity would tend to confuse and mislead consumers as to the relative value of and need for the several

²³ Respondent contended in the court below that the notice was inadequate. It appears to have abandoned that contention here, but in any event we think that it is without merit in view of respondent's participation in the original hearing, and in view of the publication of notice of a reconvened hearing devoted solely to the "propriety of the addition of vitamins and minerals to * * * (1) farina * * *."

²⁴ The effective date of the riboflavin requirement has been postponed until April 20, 1943, because it appeared that the available supply was inadequate. 7 Fed. Reg. 3055.

nutritional elements, and would impede rather than promote honesty and fair dealing in the interest of consumers."

On respondent's appeal from this order the Court of Appeals for the Seventh Circuit set it aside, 129 F. 2d 76, holding that the regulations did not conform to the statutory standards of reasonableness, that the Administrator's findings as to probable consumer confusion in the absence of the prescribed standards of identity were without support in the evidence and were "entirely speculative and conjectural," and that in any case such a finding would not justify the conclusion that the regulations would "promote honesty and fair dealing in the interest of consumers." We granted certiorari, 317 U. S. 616, because of the importance of the questions involved to the administration of the Food, Drug and Cosmetic Act.

Respondent, The Quaker Oats Company, has for the past ten years manufactured and marketed a wheat product commonly used as a cereal food, consisting of farina as defined by the Administrator's regulation, but with vitamin D added. Respondent distributes this product in packages labeled "Quaker Farina Wheat Cereal Enriched with Vitamin D," or "Quaker Farina Enriched by the Sunshine Vitamin." The packages also bear the label "Contents 400 U. S. P. units of Vitamin D per ounce, supplied by approximately the addition of $\frac{1}{3}$ of 1 percent irradiated dry yeast."

Respondent asserts, and the Government agrees, that the Act as supplemented by the Administrator's standards will prevent the marketing of its product as "farina" since, by reason of the presence of vitamin D as an ingredient, it does not conform to the standard of identity prescribed for "farina," and that respondent cannot market its product as "enriched farina" unless it adds the prescribed minimum quantities of vitamin B₁, riboflavin, nicotinic acid and iron. Respondent challenges the validity of the regulations on the grounds sustained below and others so closely related to them as not to require separate consideration.

As appears from the evidence and the findings, the products of milled wheat are among the principal items of the American diet, particularly among low income groups.²⁵ Farina, which is a highly refined wheat product resembling flour but with larger particles, is used in macaroni, as a breakfast food, and extensively as a cereal food for children. It is in many cases the only cereal consumed by them during a period of their growth. Both farina and flour are manufactured by grinding the whole wheat and discarding its bran coat and germ. This process removes

²⁵ One witness at the hearing referred to estimates that over 95% of human consumption of wheat products is in the form of white flour.

from the milled product that part of the wheat which is richest in vitamins and minerals, particularly vitamin B₁, riboflavin, nicotinic acid and iron, valuable food elements which are often lacking in the diet of low income groups. In their diet, especially in the case of children, there is also frequently a deficiency of calcium and vitamin D, which are elements not present in wheat in significant quantities. Vitamin D, whose chief dietary value is as an aid to the metabolism of calcium, is developed in the body by exposure to sunlight. It is derived principally from cod liver and other fish oils. Milk is the most satisfactory source of calcium in digestible form, and milk enriched by vitamin D is now on the market.

In recent years millers of wheat have placed on the market flours and farinas which have been enriched by the addition of various vitamins and minerals. The composition of these enriched products varies widely.²⁶ There was testimony of weight before the Administrator, principally by expert nutritionists, that such products, because of the variety and combination of added ingredients, are widely variable in nutritional value; and that consumers generally lack knowledge of the relative value of such ingredients and combinations of them.

These witnesses also testified, as did representatives of consumer organizations which had made special studies of the problems of food standardization, that the number, variety and varying combinations of the added ingredients tend to confuse the large number of consumers who desire to purchase vitamin-enriched wheat food products but who lack the knowledge essential to discriminating purchase of them; that because of this lack of knowledge and discrimination they are subject to exploitation by the sale of foods described as "enriched," but of whose inferior or unsuitable quality they are not informed. Accordingly a large number of witnesses rec-

²⁶ The report of the officer presiding at the hearing enumerates the following varieties disclosed by the testimony:

"Flours, phosphated flours, and self-rising flours—

1. One with added vitamin D;
2. One with added calcium;
3. One with added vitamin B₁, nicotinic acid, and calcium [produced by some 23 mills];
4. One with added vitamin B₁, calcium, and iron;
5. One containing wheat germ and wheat germ oil, said to furnish vitamin B₁, vitamin E and riboflavin;
6. One 'long extraction' flour containing B₁, riboflavin, calcium and iron."

"Farinas—

7. One with added vitamin D;
8. One with added vitamin B₁, calcium and iron."

The labels used, and advertising claims made, for those products were not in the record. However, there was testimony that certain of them were sold under such names as "Sunfed," "Vitawhite," "Holwhite."

ommended the adoption of definitions and standards for "enriched" wheat products which would ensure fairly complete satisfaction of dietary needs, and a somewhat lesser number recommended the disallowance, as optional ingredients in the standards for unenriched wheat products, of individual vitamins and minerals whose addition would suggest to consumers an adequacy for dietary needs not in fact supplied.

The court below characterized this evidence as speculative and conjectural, and held that because there was no evidence that respondent's product had in fact confused or misled anyone, the Administrator's finding as to consumer confusion was without substantial support in the evidence. It thought that, if anything, consumer confusion was more likely to be created, and the interest of consumers harmed, by the sale of farinas conforming to the standard for "enriched farina," whose labels were not required to disclose their ingredients, than by the sale of respondent's product under an accurate and informative label such as that respondent was using.

The Act does not contemplate that courts should thus substitute their own judgment for that of the Administrator. As passed by the House it appears to have provided for a judicial review in which the court could take additional evidence, weigh the evidence, and direct the Administrator "to take such further action as justice may require." H. R. Rep. No. 2139, 75th Cong., 3d Sess., pp. 11-12. But before enactment, the Conference Committee substituted for these provisions those which became § 701(f) of the Act. While under that section the Administrator's regulations must be supported by findings based upon "substantial evidence" adduced at the hearing, the Administrator's findings as to the facts if based on substantial evidence are conclusive. In explaining these changes the chairman of the House conferees stated on the floor of the House that "there is no purpose that the court shall exercise the functions that belong to the executive or the legislative branches." 83 Cong. Rec., p. 9096. * * *

The review provisions were patterned after those by which Congress has provided for the review of "quasi-judicial" orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe.²⁷ Under such pro-

²⁷ The provision adopted by the Conference Committee is one which was proposed as an amendment from the floor of the House by Mr. Mapes, a minority member of the House Committee and one of the House conferees. In proposing it he said that it was "the same as the court review section in the Federal Trade Commission Act with only such changes as are necessary to adapt it to the pending bill," and he referred to "similar" provisions in the Bituminous Coal Commission Act, National Labor Relations Act, Securities Exchange Act, and Federal Communications Act. 83 Cong. Rec., 7892, 7777-8.

visions we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. * * * These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. * * * Section 401 calls for the exercise of the "judgment of the Administrator." That judgment, if based on substantial evidence of record, and if within statutory and constitutional limitations, is controlling even though the reviewing court might on the same record have arrived at a different conclusion.

None of the testimony which we have detailed can be said to be speculative or conjectural unless it be the conclusion of numerous witnesses, adopted by the Administrator, that the labeling and marketing of vitamin-enriched foods, not conforming to any standards of identity, tend to confuse and mislead consumers. The exercise of the administrative rule-making power necessarily looks to the future. The statute requires the Administrator to adopt standards of identity which in his judgment "will" promote honesty and fair dealing in the interest of consumers. Acting within his statutory authority he is required to establish standards which will guard against the probable future effects of present trends. Taking into account the evidence of public demand for vitamin-enriched foods, their increasing sale, their variable vitamin composition and dietary value, and the general lack of consumer knowledge of such values, there was sufficient evidence of "rational probative force" (see *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 230, 83 L. ed. 126, 59 S. Ct. 206), to support the Administrator's judgment that, in the absence of appropriate standards of identity, consumer confusion would ensue. * * *

Respondent insists, as the court below held, that the consumer confusion found by the Administrator affords no basis for his conclusion that the standards of identity adopted by the Administrator will promote honesty and fair dealing. But this is tantamount to saying, despite the Administrator's findings to the contrary, either that in the circumstances of this case there could be no such consumer confusion or that the confusion could not be deemed to facilitate unfair dealing contrary to the interest of consumers. For reasons already indicated we think that the evidence of the desire of consumers to purchase vitamin-enriched foods, their general ignorance of the composition and value of the vitamin content of those foods, and their consequent inability to guard against the purchase of products of inferior or unsuitable vitamin content, sufficiently supports the Administrator's conclusions.

We have recognized that purchasers under such conditions are peculiarly susceptible to dishonest and unfair marketing practices. In *United States v. Carolene Products Co.*, 304 U. S. 144, 149, 150, 82 L. ed. 1234, 58 S. Ct. 778, we upheld the constitutionality of a statute prohibiting the sale of "filled milk"—a condensed milk product from which the vitamin content had been extracted—although honestly labeled and not in itself deleterious. Decision was rested on the ground that Congress could reasonably conclude that the use of the product as a milk substitute deprives consumers of vitamins requisite for health and "facilitates fraud on the public" by "making fraudulent distribution easy and protection of the consumer difficult."

Both the test and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. * * *

The provisions for standards of identity * * * reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other. We cannot say that such a standard of identity, designed to eliminate a source of confusion to purchasers—which otherwise would be likely to facilitate unfair dealing and make protection of the consumer difficult—will not "promote honesty and fair dealing" within the meaning of the statute.

Respondent's final and most vigorous attack on the regulations is that they fail to establish reasonable definitions and standards of identity, as § 401 requires, in that they prohibit the marketing, under the name "farina," of a wholesome and honestly labeled product consisting of farina with vitamin D added, and that they prevent the addition of vitamin D to products marketed as "enriched farina" unless accompanied by the other prescribed vitamin ingredients which do not co-act with or have any dietary relationship to vitamin D. Stated in another form, the argument is that it is unreasonable to prohibit the addition to farina of vitamin D as an optional ingredient while permitting its addition as an optional ingredient to enriched farina, to the detriment of respondent's business.

The standards of reasonableness to which the Administrator's action must conform are to be found in the terms of the Act construed and applied in the light of its purpose. Its declared purpose is the administrative promulgation of standards of both identity and quality in the interest of consumers. Those standards are to be prescribed and applied, so far as is practicable, to food under its common or usual name, and the regulations adopted after a hearing must have the support

of substantial evidence. We must reject at the outset the argument earnestly pressed upon us that the statute does not contemplate a regulation excluding a wholesome and beneficial ingredient from the definition and standard of identity of a food. The statutory purpose to fix a definition of identity of an article of food sold under its common or usual name would be defeated if producers were free to add ingredients, however wholesome, which are not within the definition. As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive. In many instances, like the present, that purpose could be achieved only if the definition of identity specified the number, names and proportions of ingredients, however wholesome other combinations might be. The statute accomplished that purpose by authorizing the Administrator to adopt a definition of identity by prescribing some ingredients, including some which are optional, and excluding others, and by requiring the designation on the label of the optional ingredients permitted.

Since the definition of identity of a vitamin-treated food, marketed under its common or usual name, involves the inclusion of some vitamin ingredients and the exclusion of others, the Administrator necessarily has a large range of choice in determining what may be included and what excluded. It is not necessarily a valid objection to his choice that another could reasonably have been made. The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made. *Houston v. St. Louis Independent Packing Co.*, *supra*, 487.

The evidence discloses that it is well known that the milling process for producing flours and farinas removes from the wheat a substantial part of its health-giving vitamin contents, which are concededly essential to the maintenance of health, and that many consumers desire to purchase wheat products which have been enriched by the restoration of some of the original vitamin content of the wheat. In fixing definitions and standards of identity in conformity with the statutory purpose the Administrator was thus confronted with two related problems. One was the choice of a standard which would appropriately identify unenriched wheat products which had long been on the market. The other was the selection of a standard for enriched wheat products which would both assure to

consumers of vitamin-enriched products some of the benefits to health which they sought, and protect them from exploitation through the marketing of vitamin-enriched foods of whose dietary value they were ignorant. In finding the solution the Administrator could take into account the facts that whole wheat is a natural and common source of the valuable dietary ingredients which he prescribed for enriched farina; that wheat is not a source of vitamin D; that milk, a common article of diet, is a satisfactory source of an assimilable form of calcium; that the principal function of vitamin D is to aid in the metabolism of calcium; and that milk enriched with vitamin D was already on the market.

We cannot say that the Administrator made an unreasonable choice of standards when he adopted one which defined the familiar farina of commerce without permitting addition of vitamin enrichment, and at the same time prescribed for "enriched farina" the restoration of those vitamins which had been removed from the whole wheat by milling, and allowed the optional addition of vitamin D, commonly found in milk but not present in wheat. Consumers who buy farina will have no reason to believe that it is enriched. Those who buy enriched farina are assured of receiving a wheat product containing those vitamins naturally present in wheat, and, if so stated on the label, an additional vitamin D, not found in wheat.

Respondent speaks of the high cost of vitamin B₁ (\$700 per pound), but there was evidence that the cost of adding to flour the minute quantities of the four ingredients required for enriched farina would be about 75 cents per barrel, and respondent concedes that the cost to it may be but a fraction of a cent per pound. The record is otherwise silent as to the probable effect of the increased cost on the marketing of respondent's product. On this record it does not appear that the increased cost has any substantial bearing on the reasonableness of the regulation.

We conclude that the Administrator did not depart from statutory requirements in choosing these standards of identity for the purpose of promoting fair dealing in the interest of consumers, that the standards which he selected are adapted to that end, and that they are adequately supported by findings and evidence.

Reversed.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

MR. JUSTICE ROBERTS is of opinion that the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals, 129 F. (2d) 76.

UNITED STATES v. LORD-MOTT CO.

District Court, D. Maryland, 1944, 57 F. Supp. 128

WILLIAM C. COLEMAN, District Judge—The defendant here, a Maryland canning corporation, is charged, by information, with having violated a Government regulation for determining, in part, the standard of quality for canned peas.

The Court, sitting as a jury, a jury having been waived, finds the defendant not guilty. It finds that the regulation upon alleged violations of which the information is based is invalid because it exceeds the authority granted to the Federal Security Administrator, commonly known as the Administrator, by the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 21 U. S. C. A., §§ 301-392, incl., to pass such a regulation, and therefore the Court's verdict must be not guilty as to the defendant.

* * *

The pertinent sections of the Federal Food, Drug, and Cosmetic Act are the following:

First, among the enumerated acts and the causing thereof which are prohibited are "(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded," and "(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce." 21 U. S. C. A. § 331, subsections (a) and (b).

Second, it is provided that any person who violates the foregoing provisions "shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine." 21 U. S. C. A. § 333, subsec. (a).

Third, the law provides that "Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container." 21 U. S. C. A. § 341.

Fourth, the law provides that "A food shall be deemed to be misbranded—

* * *

"(h) if it purports to be or is represented as—

"(i) a food for which a standard of quality has been prescribed by regulations as provided by section 341, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard." 21 U. S. C. A. § 343, subsec. (h).

* * *

* * * we pass to a recital of the reasons why we think the Administrator exceeded his authority in the present instance, and why, therefore, the defendant was not compelled to meet the requirements of the regulation with respect to the one specific part of it which is here involved, namely, the so-called alcohol insoluble solids, or the "AIS", method of testing quality.

We find from the weight of the credible evidence in the present case that, while this "AIS" regulation embodies a fair and reasonable way per se of determining the grade of canned peas, which, in fact, the defendant admits, nevertheless the Administrator, in the tolerance allowed in the requirements imposed by that method, has failed to make the application of that method just and reasonable to the present defendant and all others in like circumstances.

Among the suggested findings of fact as reported in the Federal Register of November 25, 1939, pages 4679-4682, are the following which were ultimately adopted by the Secretary of Agriculture as the Department findings and formed the basis for the regulation here in question, and which appear in the Federal Register for February 24, 1940, pages 741-744:

"48. The extent to which insoluble solids are present governs the mealiness of peas when they are chewed. The art of canning was first devised for the purpose of preserving the succulence of fresh vegetables, and canned peas are a product which simulates, in so far as possible, peas taken direct from the garden, cooked, and eaten. Such peas are not excessively mealy, and the quality of canned peas is lowered, depending in a large measure on the extent to which they are mealy."

"49. Mealiness in peas becomes excessive when their content of insoluble solids is such that the peas do not have the proper degree of succulence when eaten. Such mealiness can be measured objectively."

"50. Mealiness and insoluble solids content are definitely and directly correlated, and the determination of the insoluble solids gives an accurate index to the mealiness of canned peas."

"51. Canned peas are excessively mealy in the consensus of consumer taste; in the case of early June peas, when they contain more than 23.5 per cent of solids insoluble in alcohol; and in the case of sweet peas, when they contain more than 21 per cent of solids insoluble in alcohol."

Then there follow numerous references to the testimony taken at the hearing duly called and held by the Secretary of Agriculture, for the purpose, among other things, of fixing and establishing a reasonable standard of quality for canned peas, supporting the suggested findings. Also, under "Suggested Conclusion in the Form of a Regulation," p. 4682, we find the matter summarized as follows:

Section 51.001, "Canned Peas—Quality: Label statement of substandard quality. (a) The standard of quality for canned peas is as follows:

* * *

"The alcohol insoluble solids of Alaska or other smooth skin varieties of peas from the container are not more than 23.5 per cent, and of sweet, wrinkled varieties, not more than 21 per cent."

Then there follows a detailed description of how the peas shall be tested to determine whether or not they meet the above-quoted requirement, as well as the other requirements set forth in the same regulation respecting weight, etc. Since, as already stated, defendant admits the reasonableness of the method prescribed in the regulation for determining the alcohol-insoluble solids content, it is unnecessary to discuss or to describe that method.

What has just been quoted was embodied, verbatim, as regulation No. 51.001, promulgated on the 23d of February, 1940, and appearing in the Federal Register for February 24, 1940, p. 744.

As has just been said, the Court is satisfied from the weight of the credible evidence introduced in the present case that this figure of 23.5 per cent imposed an undue hardship upon canners in this area, known as the Tri-State Area, comprising Maryland, Delaware and New Jersey, such as the defendant. The testimony is not all to that effect, and due credence must be given to the opposing testimony of the witnesses for the Government. But the Court can not blink the fact that they are naturally interested, or biased, in seeing that their work or the work of their associates in this matter is upheld, and when such highly qualified witnesses as the head of the Horticultural Department of the University of Maryland and the Executive Secretary of the Tri-State Packers Association testify, as they did, that it is their definite view that the allowable tolerance for all varieties of Alaska peas works an undue hardship in that it does not give sufficient tolerance to enable such peas grown in this area to be marketed with reasonable readiness and profit, the Court feels that their testimony must be given greater weight than the testimony of the Government's witnesses.

It is uncontradicted by the testimony in the present case that a large proportion of packs in recent years in this general area are recognized as not meeting the standard required by this test; that is, they are labeled sub-standard. For example, in 1941, 28% of the pack was sub-standard. Also, it is uncontradicted that in this area, pea-packing has been declining out of proportion to the decline throughout other sections of the country. It is asserted on behalf of defendant, and the Court feels it has not been successfully contradicted, that this rigid "AIS" requirement has had a material influence in producing these conditions.

One or more of the witnesses testifying for the defendant have stated what they thought would be a proper, somewhat increased tolerance under the "AIS" requirement. One witness has stated that in his opinion it ought to be placed at 24.5 in place of 23.5. Other witnesses stated they were not entirely sure in their own minds as to just what the figure should be, but that if the law does not allow the setting of a standard for each different grade of every variety of pea, then the blanket tolerance should be somewhere in excess of 23.5.

Taking all of the foregoing into consideration,—and the Court does not mean that because it has specifically referred to certain parts of the testimony, such is all of the testimony that supports its conclusion,—but taking the testimony as a whole, as the Court sees it, we have here a clear case where an administrative agency has promulgated a regulation, the force and effect of which is to impose a hardship upon those affected by it which is not warranted or required by either the expressed or implied language of the statute, and, therefore, such a regulation must fall. However, we do not believe it to be this Court's duty in a case of this kind to attempt to fix, or to say, what the modified tolerance shall be, except that it shall be somewhat greater. Indeed, it would seem inappropriate for the Court to substitute its lay opinion in matters of this kind for that of the trained expert, by attempting to determine the precise increase to be granted in the tolerance.

In short, as the Court views the problem here, the question may be divided into two parts: First, is the regulation fair and reasonable in its effect; and second, if not, what regulation would be fair and reasonable? The Court answers the first in the negative, and in answer to the second finds that a regulation giving some tolerance in excess of the tolerance set forth in the original regulation is required, but believes that the precise extent of such greater tolerance is an administrative matter to be determined after due hearing, etc., in the manner prescribed by the Act.

* * * It is true the Administrator is vested with broad,

discretionary authority. It is also true that, for this reason, his findings are to be accepted as conclusive if supported by substantial evidence, provided always, however, they are within statutory and constitutional limitations. *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 63 S. Ct. 589, 87 L. ed. 724. In the present case, we find they are not within either limitation.

Barring cases of inherently dangerous products, as for example, poisons and habit-forming drugs with respect to which of course very stringent regulations must control, when, as here, we are dealing with one of the commonest vegetables—one of the commonest foods that all of us partake of from day to day not only in season but out (thanks to the canning industry), the rights of the grower and canner of peas must be correlated to the rights of the consumer public, so that all are protected in a fair and reasonable manner.

In the present case it follows from what has been said that the Court finds that the Administrator in promulgating that part of regulation 51.001 here involved, fixing the alcohol-insoluble solids content of Alaska peas at not more than 23.5%, has over-emphasized the factor of consumer taste, and thereby has been so rigid in the regulation, in order to meet the consumer taste, that he has acted in undue derogation of the rights of the growers and canners of such peas in this general area. Whether this finding is actually supported by the weight of the credible testimony at the hearing which led up to the promulgation of the regulation, we do not purport to determine. It is not necessary to do so, because, as heretofore explained, defendant is not controlled by what was proved or decided by that hearing, but has a right to have this Court decide the question of the regulation's validity upon the evidence produced before it.

The Administrator does not have unlimited power with respect to promulgating food regulations. He has only such power as is expressly given him or reasonably implied by the terms of the Act, so that the intent of the Act may be effectively carried out. Each case must be heard and decided upon its own facts. The Court is conscious of the fact that recently several canners appeared in this Court under similar charges, pleaded guilty and the Court imposed fines, but the legality of the regulation was not raised in those cases. Of course, had it been raised, and had all the features of the issues been presented as fully as in the present case, the Court would have been disposed to reach the same conclusion in those cases that it has reached in the present case. There is no *res adjudicata* as respects the present defendant by reason of what occurred in previous cases. No defendant in a criminal case is precluded, unless by some express statutory provision or unless he has himself waived the right, from test-

ing the validity of any statute or regulation passed pursuant thereto, when prosecuted for an alleged violation of same.

Judgment will be signed in accordance with this opinion.

**A. E. STALEY MFG. CO. v. SECRETARY
OF AGRICULTURE²⁸**

Circuit Court of Appeals, Seventh Circuit, 1941,
120 F. 2d 258

KERNER, Circuit Judge. Petitioner seeks to set aside an order of the Secretary of Agriculture promulgating a regulation fixing and establishing a definition and standard of identity for sweetened condensed milk, pursuant to § 701(f) (1) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. § 371(f) (1). The Federal Security Administrator was joined with the Secretary of Agriculture as a respondent, because the functions of the Secretary under the Act had been transferred to the Administrator under Reorganization Plan No. IV, 5 U. S. C. A. following section 133t, 5 Fed. Reg. 2421, 1940, promulgated under the Reorganization Act of 1939, 5 U. S. C. A. § 133 et seq.

This proceeding was instituted by "notice of public hearing" filed in conformity with subsection (e) of § 701 of the Act, § 701, 52 Stat. 1055, 21 U. S. C. A. § 371(e). The notice fixed the time for the purpose of holding a public hearing precedent to the promulgation of a regulation establishing a definition and standard of identity for sweetened condensed milk.

From the testimony of expert chemist witnesses it appears that a saccharine is used as a preservative and sweetening agent used by manufacturers of sweetened condensed milk for retail trade and that a mixture of sucrose and dextrose has been used to some extent for bulk or wholesale trade. It also appears that the adaptability of any particular saccharine ingredient for use in making sweetened condensed milk involves its reaction under the process and the results obtained, and that viscosity, crystallization, taste, solubility, thickness, and color must be considered.

Petitioner appeared at the hearing and offered evidence to the effect that corn syrup is a suitable sweetening ingredient in sweetened condensed milk; that from a nutritional standpoint, mixtures of sweet milk and sugars, especially sucrose, levulose, lactose and commercial glucose, commonly known as corn syrup, are physiologically essentially equivalent, interchangeable, and equal in value, and might be substituted one for the other, that corn syrup has about the same physiological effect on consumers

²⁸ The footnotes have been omitted.

as other sugars; that a definition of sugar restricted to mean only sucrose, in sweetened condensed milk, would be an injustice to the consumer and that a reasonable definition and standard for the best interest of consumers should read in effect "a mixture of sweet milk and sucrose, dextrose, levulose or any other digestible sugars."

There is no evidence in the record of a prior commercial use of corn syrup in the manufacture of sweetened condensed milk.

On June 28, 1940, upon consideration of the evidence received at the hearing, the Secretary of Agriculture made his findings of fact and stated his conclusion. He found that the liquid or semi-liquid food prepared by evaporating part of the moisture from a mixture of the sweet milk of cows and a saccharine ingredient is commonly known as sweetened condensed milk and that the saccharine ingredient in sweetened condensed milk is refined sugar (sucrose) or any mixture of refined sugar (sucrose) and refined corn sugar (dextrose). Based upon those findings he issued an order promulgating the regulation fixing and establishing the definition now involved, the pertinent portion thereof reading as follows: "Sweetened Condensed Milk is the liquid or semi-liquid food made by evaporating a mixture of sweet milk and refined sugar (sucrose) or any combination of refined sugar (sucrose) and refined corn sugar (dextrose)."

Petitioner now contends that the findings are not supported by substantial evidence, that the Secretary of Agriculture failed to make a finding that corn syrup (glucose) is a saccharine ingredient of sweetened condensed milk, and that he did not include corn syrup in the regulation promulgated.

At the outset we are met with respondents' contention that the petition should be dismissed for lack of jurisdiction over the subject matter. They insist we should not listen to a party who complains of a grievance which is not his. * * * On the other hand, petitioner insists that his case presents an actual controversy, and that it is a "person who will be adversely affected by such order."

In support of its contention petitioner's counsel asserts that his case involves a real and substantial controversy admitting a specific relief through a decree of conclusive character and it is a person who will be adversely affected by the order. He calls our attention to § 701(f) (1) of the Federal Food, Drug, and Cosmetic Act defining our jurisdiction to review the Secretary's order, which reads thus: "In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals * * * for a judicial review of such order." The argument continues:

"The whole thought behind the phrase 'any person who will be adversely affected,' " is that it was carefully designed and constructed to allow the orders of the Secretary to be contested by those not only adversely affected at the time and date of the order's promulgation, but also those who in the future "will be" adversely affected and concludes "petitioner's interests are now and will in the future certainly be adversely affected," and "petitioner has suffered and will continue to suffer a direct injury in being deprived of a part of its right to engage in interstate commerce."

Petitioner is not engaged in the sale of sweetened condensed milk, but is engaged in the manufacture and sale of corn syrup. In its petition it alleges that the effect of the order is adverse to its interests and will prevent the sale of its corn syrup to the condensed milk industry for use as a saccharine ingredient in sweetened condensed milk.

* * * We think the record does present an actual controversy as to the validity of the order, that petitioner is within the provision of the Act entitling it to review, and that we have jurisdiction.

We now come to the question whether the order of the Secretary is in accordance with law.

The Federal Food, Drug, and Cosmetic Act, by § 341, empowered the Secretary to promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, whenever in his judgment such action will promote honesty and fair dealing in the interest of consumers, and by § 371 (e) he is required to base his order on substantial evidence of record at the hearing and to set forth as part of the order detailed findings of fact on which the order is based.

* * * In exercising the authority granted by the Act now involved, the Secretary must promulgate reasonable regulations that are in compliance with the Act, such as will promote honesty and fair dealing in the interest of consumers. *Morgan v. Nolan*, D. C., 3 F. Supp. 143, and *Nolan v. Morgan*, 7 Cir., 69 F. 2d 471. He is the fact-finding body. This court examines the evidence, not to make findings for the Secretary but to ascertain whether his findings are properly supported.

In the instant case the Secretary made no finding of fact that refined sugar (sucrose) and refined corn sugar (dextrose) are the only saccharine ingredients in sweetened condensed milk. While it is true that the requirement of essential findings does not require an impracticable exactness, nevertheless we think that unless a specific finding is made with reference to corn syrup or an exclusive finding made with reference to refined sugar and

corn sugar, the interests of the consumers have not been given that consideration which Congress had in view; consequently, the order is not made in accordance with law.

It is so ordered.

On Petition for Rehearing

The petitioner adduced evidence at the hearing, which is undisputed, which appears to constitute "substantial evidence of record," but which the Secretary of Agriculture ignores completely in its order. The statute provides that the Secretary "shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based." 21 U. S. C. A. § 371 (e).

In effect petitioner complained that the administrative fact finder did not consider the evidence in question. Certainly the right to present evidence is a barren one if the trier of fact fails to consider it. *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. ed. 1288; *Id.*, 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. ed. 1129. Yet it is impossible to tell from the record whether the Secretary of Agriculture weighed the evidence and cast it aside in the exercise of his administrative discretion. Consequently, the uninformed petitioner was encouraged to resort to further litigation, and a review court finds itself helpless to exercise its limited judicial review with any degree of propriety.

It seems to us that respect for the rights of parties before it and pride in the proper dispensation of administrative justice, would compel administrative bodies to make their positions clear and thereby enable all to understand the basis of their decisions. In a recent case the Supreme Court has observed that "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge v. National Labor Relations Board*, 313 U. S. 177, 61 S. Ct. 845, 853, 85 L. ed. 1271, decided April 28, 1941.

We therefore have remanded this case and have asked the fact finder to disclose the basis of its order. We also suggested that a specific finding may be made with reference to corn syrup or an exclusive finding with reference to refined sugar and corn sugar. Perhaps an explanation as to its disposition of petitioner's evidence would be sufficient. We do not think, as does the respondent, that this disposition of the case requires "anything unreasonable or impracticable in regard to findings. *Florida v. United States*, 292 U. S. 1, 9 (54 S. Ct. 603, 78 L. ed. 1077); *United States v. Louisiana*, 290 U. S. 70, 78 (54 S. Ct. 28, 78 L. ed. 181)."

The concluding paragraph in our opinion should be deleted, and it is so ordered. The petition for rehearing is denied.

Note: On the question of ascertaining just what persons are sufficiently "adversely affected" to authorize an appeal from a regulation concerning standards of identity for food, compare *United States Cane Sugar Refiners' Association v. McNutt*, 138 F. 2d 116 (C. C. A. 2nd, 1943). See also *Land O'Lakes Creameries, Inc. v. McNutt*, 132 F. 2d 653 (C. C. A. 8th, 1943).

**UNITED STATES v. 3 7/12 DOZEN PACKAGES OF
NU-CHARME PERFECTED BROW TINT
SAME v. 26 CARTONS OF NU-CHARME PERFECTED
BROW TINT**

District Court, W. D. Louisiana, 1945
59 F. Supp. 284

DAWKINS, District Judge. These two cases involve the same issues (and will be disposed of in one opinion), in which the Government seeks to condemn and have destroyed certain quantities of the product known as "Nu-Charme Perfected Brow Tint * * *," found on analysis to consist essentially of paraphenyldiamine, approximately four per cent, dissolved in water * * * and that the article is adulterated within the meaning of 21 U. S. C. A. § 361(a), in that it contains a poisonous and deleterious substance, namely, paraphenyldiamine, which may render it injurious under the conditions prescribed in the labelling thereof, as follows:

"* * * Use Glass, China or Wooden Dish for Mixing Fifteen (15) drops Solution No. 1 with Fifteen (15) drops Solution No. 2; to this add enough powder No. 3 to make thick paste. Be sure paste will not run.

"Application

"Using small clean orange stick apply dye mixture to lashes * * * then to brows. Leave mixture on until dry * * * 10 to 15 minutes.

* * *

"Do Not Let Patron Open Eyes Until All of Mixture Has Been Removed. * * *"

The seizure was made and appropriate proceedings taken for the condemnation as having been sold in interstate commerce. Thereupon, James B. Bird, doing business as Nu-Charme Laboratories, intervened and claimed ownership of the seized product. Among other things he admitted that it was a cosmetic within the intent and meaning of the Act of June 25, 1938, known as the "Pure Food, Drug, and Cosmetic Act"; but denied that it was adulterated within the meaning of 21 U. S. C. A. § 361(a) or

that it contained poisonous and deleterious substances, which render it injurious to users under conditions of use prescribed in the label thereof. Claimant then quoted in detail the directions for preparation and use which he alleged accompanied the product.

On January 16, 1945, plaintiff filed an amended libel in which it was alleged as follows:

"That the article heretofore herein seized is further adulterated within the meaning of 21 U. S. C. 361(e) [21 U. S. C. A. § 361(e)], in that it is not a hair dye and bears and contains a coal tar color that has not been listed for use in cosmetics in accordance with regulations of the Administrator of the Federal Security Agency pursuant to 21 U. S. C. 364 [21 U. S. C. A. § 364], and is other than one from a batch that has been certified."

On February 19, 1945, the following proceedings were also filed:

(1) A second amendment to the libel, from which the following is quoted:

"Notwithstanding, in order to have the pertinent regulations before the Court, libelant shows that the Federal Register of Tuesday, May 9, 1939, Volume 4, Number 89, beginning on page 1922, contains the following:

"Rules, Regulations, Orders

"Title 21—Food and Drugs

"Food and Drug Administration

"In the matter of public hearing for purpose of receiving evidence upon basis of which regulations may be promulgated for listing of coal-tar colors which are harmless and suitable for use in foods, drugs, and cosmetics, drugs and cosmetics, and externally applied drugs and cosmetics: For certification of batches of such colors: For procedures thereunder: And for payment of fees therefor.

"Order of the Secretary promulgating regulations effective on publication

"Pursuant to, and under and by virtue of, the authority and direction of the Federal Food, Drug, and Cosmetic Act * * * and based upon substantial evidence of record at the hearing in the above-entitled matter, detailed findings of fact are made, as follows:

Findings of Fact

"Coal-tar colors—Derivation—scope of term.

"That coal-tar colors are materials consisting of one or more substances which either are made from coal-tar, or are capable

of derivation from intermediates of the same identity as coal-tar intermediates. They include all substances from these sources which are themselves colored and impart their color to the substance to which they are applied, and they also include those compounds which do not themselves possess the color imparted to the substance to which they are applied but which, when applied to such substance, impart color. (For example: Orange I is prepared from coal-tar intermediates. It is itself colored and imparts color when applied to a substance. Alizarin may be made either from coal-tar intermediates or from the root of the madder plant. It is colored and imparts color and is considered a coal-tar color whether derived from coal-tar or from a natural source. Paraphenylenediamine is colorless but is considered a coal-tar color, since it is derived from coal-tar and imparts color when applied to other substances.) Coal-tar colors may also include diluents or substrata. In the manufacture of coal-tar colors all impurities are not completely eliminated."

* * *

"3. No coal-tar color in the orbital area.

"That coal-tar colors are not harmless for use in preparations applied to the area of the eye, which means the area bounded by the supra-orbital ridge and the infra-orbital ridge, including the eyebrow, the skin below the eyebrow, the eyelids, the eyelashes, the conjunctival sac of the eye, the eyeball, and the soft areolar tissue that lies within the perimeter of the infra-orbital ridge. The application of coal-tar colors to this area may cause serious injury and even loss of sight. No coal-tar color should be certified for use in a product to be applied to the area of the eye. A coal-tar color used in a product to be applied to this area should be considered to be from a batch that has not been certified, even though such color is from a batch that has been certified for other use."

* * *

(3) A motion to dismiss the amended libels for reasons * * * as follows: * * * (f) that the administrator failed to give proper notice of hearing before prescribing such regulations as required by 21 U. S. C. A. § 371 (e), and finally that intervenor had no notice of such hearing at all until the libels were filed.

* * *

It will be noted that under subsection (e) of § 371 the administrator may "on his own initiative or upon application of any interested industry or substantial portion thereof * * * shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections * * * 364"; that he shall give appropriate notice,

etc., and that no such order shall take effect until ninety days after its issue. The dates on which the orders or regulations were issued in this matter appeared in the quotation from the amended bill of the government above. But the portions so quoted, as appearing in the Federal Register of May 9, 1939, do not show how or when the notice of the hearing was given or on what date it was held. * * *

* * * [It is argued] that 21 U. S. C. A. § 371, violates the 14th amendment in that it fails to provide "effective notice to those who may be vitally concerned by such contemplated orders, regulations, etc."

* * *

Before this court can determine whether the notice and hearing held were sufficient to constitute due process, it will be necessary to have before it a certified copy of the proceedings had before the administrator, as provided by subsection (e) of § 371, which can be obtained by claimant for use herein, under subsection (g).

The motion to dismiss will therefore be denied, but the matter is held open upon the issues of the constitutional questions to afford the parties an opportunity to obtain and file in this case certified copies of the proceedings had before the administrator, showing specifically the time and manner of giving notice to the claimant and others in said industry, as well as the character of the hearing.

UNITED STATES v. 3 7/12 DOZEN PACKAGES OF
NU-CHARME PERFECTED BROW TINT
SAME v. 26 CARTONS OF NU-CHARME PERFECTED
BROW TINT

District Court, W. D. Louisiana, 1945
61 F. Supp. 847

DAWKINS, District Judge. In the opinion handed down in these consolidated cases on March 16, 1945, D. C., 59 F. Supp. 284, 289, it was said:

"The motion to dismiss will therefore be denied, but the matter is held open upon the issues of the constitutional questions to afford the parties an opportunity to obtain and file in this case certified copies of the proceedings had before the administrator, showing specifically the time and manner of giving notice to the claimant and others in said industry, as well as the character of the hearing."

This ruling was made upon motion of the claimant or intervenor to dismiss the libel, and as indicated therein, the Court

considered the only serious issue to be the constitutional one as to whether a reasonable opportunity to be heard had been afforded the intervenor and others in its position before the regulation prohibiting the use of coal-tar in the manufacture of eyelash and brow tints was adopted.

In compliance with the suggestion or requirement contained in the concluding paragraph of the opinion quoted above, counsel for the government obtained and filed in the record the following:

(1) A press release under date of January 6, 1939, of a hearing to be had on February 6, 1939, in one of the buildings occupied by the Secretary of Agriculture in Washington, D. C., at which all persons using or proposing to use coal tar or its products in the manufacture of commodities for sale to the public, would be given an opportunity to be heard, either in person or through representative.

(2) Three copies of the Federal Register of dates January 7, April 8 and May 9, respectively.

(1) The press release stated that at the proposed hearing there would be considered "some one hundred and thirty-two coal tar colors on which interested persons may submit testimony concerning harmlessness and suitability for use." It also stated that, "It is not proposed to certify any color for use in eyelash or eyebrow dyes." Presumably this release was published in the various trade journals of the many businesses or industries using coal tar colors.

(2) The Federal Register of January 7, 1939, among other things dealing with coal tar colors, etc., contained the following:

"Notice of public hearings for the purpose of receiving evidence upon the basis of which regulations may be promulgated providing for the listing of coal-tar colors which are harmless and suitable for use in foods, drugs, and cosmetics, drugs and cosmetics, and externally applied drugs and cosmetics; for the certification of batches of such colors; for procedures thereunder; and for the payment of fees therefor."

"(o) The authorization contained in these regulations for the certification of coal-tar colors for use in food, drugs, and cosmetics, or in drugs and cosmetics, or in externally applied drugs and cosmetics, shall not be considered to authorize the certification of any coal-tar color for use in an eyelash dye or an eyebrow dye. A coal-tar color so used shall be considered to be from a batch that has not been certified in accordance with these regulations, even though such color is from a batch that has been certified for other use."

The issue of April 8, 1939 contained the following:

**"Department of Agriculture
"Food and Drug Administration**

"In the matter of public hearing for purpose of receiving evidence upon basis of which regulations may be promulgated providing for listing of coal-tar colors which are harmless and suitable for use in foods, drugs, and cosmetics, drugs and cosmetics, and externally applied drugs and cosmetics; for certification of batches of such colors; for procedures thereunder; and for payment of fees therefor."

"No direct, positive testimony was introduced by other interested persons to controvert, or tending to controvert, the testimony introduced by the Department to the effect that the application of any coal-tar color to the orbital area is liable to cause serious consequences, even resulting in impairment or loss of sight, and that no coal-tar color should be considered for listing for use in that area."

"No coal-tar color in the orbital area. That coal-tar colors are not harmless for use in preparations applied to the eye. The anatomical structure of the eye includes the area bounded by the supra-orbital ridge and the infra-orbital ridge, including the eyebrow, the skin below the eyebrow, the eyelids, the eyelashes, the conjunctival sac of the eye, the eyeball, and the soft areolar tissue that lies within the perimeter of the infra-orbital ridge. The application of coal-tar colors to this area may cause serious injury and even loss of sight. A coal-tar color which is certified for use in food, drugs, and cosmetics, or in drugs and cosmetics, or in externally applied drugs and cosmetics, should not be certified for use in a product to be applied to the eye. A coal-tar color used in a product to be applied to the eye should be considered to be from a batch that has not been certified, even though such color is from a batch that has been certified for other use. * * *"

The issue of May 9, 1939, contained the following, among others on the subject of use of coal tar for colors:

"Rules, Regulations, Orders

"Title 21—Food and Drugs

"Food and Drug Administration

"In the matter of public hearing for purpose of receiving evidence upon basis of which regulations may be promulgated for listing of coal-tar colors which are harmless and suitable for use in foods, drugs and cosmetics, drugs and cosmetics, and externally applied drugs and cosmetics; for certification of batches of such colors; for procedures thereunder; and for payment of fees therefor.

"Order of the secretary promulgating regulations effective on publication

"Pursuant to, and under and by virtue of, the authority and direction of the Federal Food, Drug, and Cosmetic Act * * * and based upon substantial evidence of record at the hearing in the above entitled matter, detailed findings of fact are made, as follows:

* * *

"No coal-tar color in the orbital area. That coal-tar colors are not harmless for use in preparations applied to the area of the eye, which means the area bounded by the supra-orbital ridge and the infra-orbital ridge, including the eyebrow, the skin below the eyebrow, the eyelids, the eyelashes, the conjunctival sac of the eye, the eyeball, and the soft areolar tissue that lies within the perimeter of the infra-orbital ridge. The application of coal-tar colors to this area may cause serious injury and even loss of sight. No coal-tar color should be certified for use in a product to be applied to the area of the eye. A coal-tar color used in a product to be applied to this area should be considered to be from a batch that has not been certified, even though such color is from a batch that has been certified for other use."

From this showing it is evident that the claimant and all other interested persons were given all the notice possible, in view of the very large numbers of persons and industries involved. It further appears that all of those who filed appearances either in "person or through representatives," were given ten days in which to file briefs or arguments upon any point involved; and that such exceptions as were filed were duly considered, some sustained and others rejected. None appeared to have been made to the regulation providing that no batches of dye would be certified for use in eyelash or eyebrow tint.

On April 19, 1945, a further hearing was had by the court in this case, at which these exhibits were filed. Subsequently, in the month of July, the exact date does not appear in the minutes, counsel for claimant brought the matter to the attention of the court, and advised that he did not intend to file further briefs, as had been suggested at the time of the hearing, and requested that the case be disposed of as it stood.

Without finding it necessary to go further into facts or law thus presented, it is sufficient to say that, in my opinion, there was due process and a compliance with the statute and that the plea of unconstitutionality of intervenor must fail.

The motion to dismiss will therefore be overruled.

Note: Observe the reference in the above two opinions to the constitutional requirement of appropriate notice in administrative rule-making procedure. How well grounded is the assumption that there is such a requirement? What do the follow-

ing cases have to say about the problem: *Opp Cotton Mills, Inc. v. Administrator of the Wages and Hours Division of the Department of Labor*, 312 U. S. 126, 85 L. ed. 654, 61 S. Ct. 524 (1941); *Bowles v. Willingham*, 321 U. S. 503, 88 L. ed. 892, 64 S. Ct. 641 (1944); *Pearson v. Walling*, 138 F. 2d 655 (C. C. A. 8th, 1943), cert. den. 321 U. S. 755 (1944).

PROBLEMS²⁹

Problem A:

It has been the practice of the Food and Drug Administration to answer communications concerning questions which members of the industry desire to have answered in order to avoid violations of the Food, Drug and Cosmetic Act. Often a question so posed is of such a nature that the Administration considers it desirable to bring the answer to the attention of the whole industry. Accordingly, it issues so-called "Trade Correspondence" (T.C.) letters. Being interpretative opinions, they come within the exemption of 4(a) of the Administrative Procedure Act. Since, however, they are technically "rules", they are required, under section 3(a) 3 of that Act to be published in the Federal Register.

1. What would be the legal effect of the failure of the Food and Drug Administration to publish the "T.C." letters in the Federal Register? See the Federal Register Act, 49 Stat. 500 et seq. (1933), 44 U. S. C. No. 301 et seq. (1946).

2. The following interpretative opinion appeared in the Federal Register, March, Vol. 13, p. 1406:

Part 3—Statements of General Policy of Interpretation
Notice to Manufacturers, Packers and Distributors of Drugs
for Internal Use Which Contain Mineral Oil

Pursuant to section 3 of the Administrative Procedure Act (60 Stat. 237, 238), the following interpretation is issued:

§ 3.4 Notice to manufacturers, packers, and distributors of drugs for internal use which contain mineral oil. In the past few years research studies have altered medical opinion as to the usefulness and harmfulness of mineral oil in the human body. These studies have indicated that when mineral oil is used orally near mealtime it interferes with absorption from the digestive tract of provitamin A and the fat-soluble vitamins A, D, and K, and consequently interferes with the utilization of calcium and phosphorus, with the result that the user is left liable to deficiency diseases. When so used in pregnancy it predisposes to hemorrhagic disease of the newborn.

²⁹ These problems deal with administrative rule making activities on the federal level. Similar problems can be devised to explore the implications of rule making activities in the various state jurisdictions.

There is accumulated evidence that the indiscriminate administration of mineral oil to infants may be followed by aspiration of the mineral oil and subsequent "lipoid pneumonia."

In view of these facts, the Federal Security Agency will regard as misbranded under the provisions of the Federal Food, Drug, and Cosmetic Act a drug for oral administration consisting in whole or in part of mineral oil, the labeling of which encourages its use in pregnancy or indicates or implies that such drug is for administration to infants.

It is also this Agency's view that the act requires the labelings of such drugs to bear a warning against consumption other than at bedtime and against administration to infants. The following form of warning is suggested: "Caution: To be taken only at bedtime. Do not use at any other time or administer to infants, except upon the advice of a physician."

This statement of interpretation does not in any way exempt mineral oil from complying in all other respects with the requirements of the Federal Food, Drug, and Cosmetic Act. (Sec. 3, 60 Stat. 238; 5 U. S. C. 1002).

Dated: March 12, 1948.

Oscar R. Ewing,
Administrator

Assume that a manufacturer of drugs containing mineral oil is of the belief that this interpretation is arbitrary and erroneous, and requests you to do what you can to contest it. What would your chances be for obtaining judicial review of the interpretative opinion? See *Columbia Broadcasting System v. United States*, 316 U. S. 407, 86 L. ed. 1563, 62 S. Ct. 1194 (1942).

Problem B:

The following sections, among others, of the Food, Drug, and Cosmetic Act permit the making of "rules" of a substantive nature without agency hearing, thus making applicable the procedure prescribed in section 4 of the Administrative Procedure Act: § 403(e) (2) (exemption from declaring weight); § 403(i) (2) (exemption that label bear name); § 403(k) (exemption from declaring artificial flavoring, coloring or chemical preservative); § 405 (exemption from labeling requirement of small, open containers of fresh fruit and foods intended for repackaging, etc.); § 502(b) (2) (exemption from declaring weight); § 502(e) (2) (exemption from labeling requirement that drug bear common or usual name of each active ingredient and quantity, kind and proportion of each of specified drugs and their derivatives); § 502(f) (1) (exemption of drugs from bearing adequate directions); § 503(a) (exemption from labeling require-

ment of drugs intended for reprocessing, etc.); § 505(i) (exemption from "new drug" provisions, if for investigational use). Who is an "interested person" within the meaning of section 4(d) of the Federal Administrative Procedure Act? Would it encompass any consumer of food, drugs or cosmetic products? Suppose the Food and Drug Administration arbitrarily refuses to consider a petition of an "interested person" for the issuance of a rule exempting certain foods from the labeling requirements under any of the above provisions of the Food, Drug, and Cosmetic Act. What redress, if any, may be obtained under the Federal Administrative Procedure Act? See *Cook Chocolate Co. v. Miller*, 72 F. Supp. 573 (D. C., 1947).

Problem C:

Would the advent of the Federal Administrative Procedure Act in any way suggest any departures from the holdings in the *Quaker Oats*, *supra* 383, the *Lord-Mott*, *supra* 393, the *Staley*, *supra* 398 and *Nu-Charme*, *supra* 405 cases?

Problem D:

Assume that the regulation in *Pacific States Box & Basket Co. v. White*, *supra*, p. 370 was issued by a federal agency pursuant to federal legislation. Who, under the Federal Administrative Procedure Act, would have the burden of proof in establishing the reasonableness of the regulation?

Problem E:

Under section 5(c) of the Federal Administrative Procedure Act it is provided that:

In every case of *adjudication* required by statute to be determined on the record after opportunity for an agency hearing, * * * [t]he same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for

initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency. (Emphasis supplied.)

Assume in the Quaker Oats case 1. that the Quaker Oats Company had a patented farina product which it planned to manufacture exclusively, 2. that the only difference between the patented product and standard farina was the addition of a secret health-giving ingredient, 3. that a hearing was held in accordance with the procedures of the Federal Administrative Procedure Act which relate to rule making, and 4. that the Administrator denied a separate standard of identity for the product. Could the Administrator's decision be attacked on the ground that the denial was, in effect, adjudicatory and not legislative, and that only by complying with the provisions of section 5(c) of the Federal Administrative Procedure Act could a fair hearing have been held? See K. C. Davis, *Administrative Rules—Interpretative, Legislative and Retroactive*, 57 Yale L. J. 919-28 (1948).

Problem F:

In Problem E, *supra*, could the government plausibly argue that, inasmuch as no affirmative action was taken by the Administrator after the hearings, judicial review was thereby precluded?

Problem G:

Assume, 1. that the Food and Drug Administration amended its rules of procedure applicable to regulations fixing standards of identity and quality of foods, 2. that these amendments were for the purpose of bringing the existing procedure into better compliance with the provisions of the Administrative Procedure Act, 3. that the Food and Drug Administration failed to publish these amendments in the Federal Register, as required by section 3 of the Federal Administrative Procedure Act, 4. that a hearing is now being held preparatory to the issuance of a regulation governing the standards of quality of a certain food product, and 5. that the interested parties had no actual notice of the changes in the rules of procedure which are being followed at the hearing. Would you advise that steps be taken to enjoin the Administrator from continuing the hearing because of the failure to comply with section 3? Do *Olin Industries v. National Labor Relations Board*, 72 Fed. Supp. 225 (D. C. Mass., 1947) or *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. ed. 638, 58 S. Ct. 459 (1938) have any bearing on this problem?

Problem H:

Suppose that, during the course of a hearing under Sec. 701(e) of the Food, Drug, and Cosmetic Act to establish a standard of identity for food, the hearing officer issues an arbitrary ruling to the effect that none of the government's witnesses may be cross-examined. Could a mandatory injunction be obtained under the Administrative Procedure Act to compel the hearing officer to reverse the ruling? Of what relevance, if any, are *Paramine Lumber Co. v. Marshall*, 95 F. (2d) 203 (C. C. A. 9th, 1938), cert. denied 305 U. S. 603 (1938), and *Avon Dairy Co. v. Eisman*, 69 Fed. Supp. 500 (N. D., Ohio, 1946)? Would it be feasible to endeavor to obtain a temporary restraining order from a court, staying further hearings before the hearing officer pending the decision of the court as to the propriety of the hearing officer's ruling? See *Eastern Utilities Associates v. Securities and Exchange Commission*, 162 F. (2d) 385 (C. C. A. First, 1947).

Problem I:

Suppose that, pursuant to Sec. 701(e), the Administrator issues a regulation governing the quality of canned apricots on the basis of findings established from evidence introduced not only at the hearing but also from information of which the Administrator later took "official notice." Would the regulation be vulnerable to attack because the canning companies which appeared at the hearing did not have the opportunity to rebut this latter evidence during the hearing? Of what relevance, if any, are *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724 (1937), and *Market St. Railway Co. v. Railroad Commission of California*, 324 U. S. 548, 89 L. ed. 1171, 65 S. Ct. 770 (1945)?

Problem J:

1. Assume the facts of problem I, except that instead of taking "official notice" of these facts, the administrator relies on "official records" in his files—records which have been prepared after scientific investigation by government specialists in the Administrator's employ.

2. Suppose these records were placed in evidence during the hearing—not by persons who prepared them, but by an administrative officer in the department who had no direct part in the scientific investigation. Could the canning companies legitimately claim that, inasmuch as they were deprived of the right to cross-examine those who actually prepared the records, that they were denied a fair hearing? Do the following cases have any bearing on these problems: *Lakemore Co. v. Brown*, 137 Fed. (2d) 105

(C. C. A. 6th, 1941) ; *Lindsey v. Public Utilities Commission*, 111 Ohio St. 6, 144 N. E. 729 (1924), and *Re New England Power Corp.*, 103 Vt. 453, 156 Atl. 390 (1931) ?

Problem K:

The Attorney General's Committee on Administrative Procedure summarized as follows some of the established judicial standards for the review of *administrative adjudication*:³⁰

"* * * the courts [in reviewing administrative adjudication] have ventured to enunciate only the general standards which guide but do not compel, and which leave considerable room for judgment and wise choice."

"First of these general standards is that only a person with 'legal standing' can attack an administrative act. The standing may be conferred by statute; but it frequently is not so conferred in specific terms. The question is then whether the person has otherwise a private right not to have the administrative body act in the allegedly unlawful manner. The issue is similar to that raised in a suit contesting the constitutionality of a statute. It is, of course, to some extent question begging. But it can be given greater particularity only in a specific context. For example, the Supreme Court has held that a railroad may, and a shipper may not, contest some orders of the Interstate Commerce Commission.³¹ Whether a particular person shall have the right to contest administrative action, as whether he shall have the right to contest legislative action, is a question of law and policy dependent upon a number of variable factors. Consideration, though not conclusive, has been given, for example, to the nature and extent of the person's interest, and the character of the administrative act, whether it commands conduct by the person, permits conduct by his rival, withholds a service or benefit which the Government is free to withhold, and so forth."

* * *

"Proposals to define the class of persons who can attack acts of administrative agencies in general are either futile or dangerous: Futile because they can hardly go beyond the present generality of persons 'aggrieved' or 'adversely affected' or otherwise having 'legal standing'; dangerous if they go beyond it, unless the redefinition is based on detailed consideration of the specific judicial determinations made in the particular situation. For otherwise arrangements resulting from a painstaking choice of policy by Congress and by the judiciary,

³⁰ Sen. Doc. No. 8, 77th Cong. 1st Sess., 84-86, 88, 91 (1941). The selected footnotes have been renumbered.

³¹ *Alexander Sprunt & Sons v. United States*, 281 U. S. 249, 74 L. ed. 832, 50 S. Ct. 315 (1930).

which allows for wise adaptability to specific situations as they are presented, might be blindly destroyed without knowledge as to whether the actual changes effected are desirable or regrettable. Experience shows that even with respect to specific agencies, both the Congress and the courts have hesitated to define exhaustively the class of persons entitled to judicial review. Occasionally pains are taken out of an abundance of caution to assure review for a particular group or to assure that review will not be denied solely for a particular reason, as, for example, that the person seeking review was not a party to the administrative proceeding. But even there wide discretion is still left to the courts. And the courts have reached similar results without such legislation. Thus, the Supreme Court has held, even in the absence of provisions similar to those in the Federal Communications Act, (a) that a person aggrieved by an order of the Interstate Commerce Commission in some cases may have judicial review though he was not a party before the Commission, and (b) that a party before the Commission is not necessarily entitled to judicial review."³²

"A second standard is that judicial review is generally not available for preliminary and procedural orders of administrative agencies. The requirement of finality of administrative action and exhaustion of administrative remedies as a prerequisite of judicial review has been formulated by the courts in the absence of legislation. Legislation which limits judicial review to 'final' orders merely enacts the self-imposed policy of the courts. In the judicial hierarchy, too, appeals are generally restricted to final judgments. Conservation of judicial energy and convenience of litigants are deemed to require that appeal be postponed until opportunities for correction of error by the lower court are foreclosed by entry of final judgment; and here, too, the litigant is generally required to exhaust his remedies in the lower court. With respect to judicial review of administrative determinations the same considerations are applicable. And there is the added factor that court and agency are not parts of the same hierarchy. Maintenance of amicable relations between them and avoidance of disrupting conflict requires generally that the administrative agency be permitted to finish its job before the court steps in. But it is not always easy to determine what is a final order, just as it is not always easy to determine what is a final judgment. The requirement is flexible enough to permit its adaptation by the courts to special situations."³³

³² Chicago Junction Case, 264 U. S. 258, 268-269, 68 L. ed. 667, 44 S. Ct. 317 (1924); Alexander Sprunt & Sons v. United States, 281 U. S. 249, 74 L. ed. 832, 50 S. Ct. 215 (1930).

³³ Compare the Utah Fuel Case, *supra*, * * * [306 U. S. 56 (1939)].

"Third, until the 1938 term of the Supreme Court there was a judicial doctrine that 'negative orders' of administrative agencies were not subject to judicial review. The Court never gave precise descriptions which would insure the recognition of such an order. A 'negative order' was presumably one by which the administrative agency denied the relief claimed by the applicant. But the doctrine was not held applicable to all such orders. The criterion of disabling negativeness was therefore a matter of much dispute and the character of the order in specific cases was subject to controversy even after judicial decision of the issue. No legislation created this class of nonreviewable orders; and, except in the case of a few agencies, no legislation destroyed it. But the Supreme Court in 1938 reconsidered its precedents and expressly denied further vitality to 'negativeness' as a criterion of nonreviewability.³⁴ The court created and the court destroyed—in a striking example of judicial response to need and experience."

* * *

"On the procedural side are all the requirements of fairness derived from the Constitution and statute—requirements which, if not met may * * * invalidate administrative action without inquiry into the merits of the results reached by the administrative body. Are notice and hearing prerequisite to the validity of the administrative action? If so, what kind of notice and what kind of hearing? Before whom may the hearing be held and by whom must the administrative determination be made? Was the aggrieved party given proper opportunity to present relevant evidence and to contest evidence used by the agency? Is the administrative decision required to be based only on evidence of record and, if so, did the agency take into consideration evidence not made part of the record? Is the agency required to formulate findings as a basis for its action and, if so, did it properly make the required findings? These are questions which the court may ask on review and the answers to which may determine the validity of the administrative action."

* * *

"Under existing standards, then, the courts may narrow their review to satisfy the demands for administrative discretion, and they may broaden it close to the point of substituting their judgment for that of the administrative agency. In exercising their powers of review, the courts have been influenced, it is commonly thought, by a variety of inarticulate factors: The character of the administrative agency, the nature of the problems with which it deals, the nature and consequences of the administrative

³⁴ *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 83 L. ed. 1147, 59 S. Ct. 754 (1939).

action, the confidence which the agency has won, the degree to which the review would interfere with the agency's functions or burden the courts, the nature of the proceedings before the administrative agency, and similar factors."

* * *

To what extent do you think these standards for the review of administrative adjudication are now applicable to the review of administrative legislation, e. g. that type of legislation that is involved in the fixing of standards of identity and quality under section 701 (e) of the Federal Food, Drug, and Cosmetic Act of 1938?

CHAPTER 6

UTILIZING LEGISLATIVE PRECEDENT AND ANALOGY

A. INTRODUCTORY NOTE

In his now classic "The Nature of the Judicial Process", Justice Cardozo made clear the importance of the role of *judicial precedent* and analogy in the work of deciding cases:¹

The first thing he [i. e. the judge] does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase, "in the legal smithy". *Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn.* None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. * * * If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit. Whatever its psychological basis, it is one of the living forces of our law. (Emphasis supplied)

But once having found the precedents (if there are any to be found):

* * * he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die. * * * Let us assume * * * that the principle, latent within * * * [the precedent] has been skillfully extracted and accurately stated. Only half or less than half the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

¹ The following excerpts from pp. 19-20, 22, 28, 30, 38-39, 40-43 of Cardozo's, *The Nature of the Judicial Process*, are reprinted with the permission of the Yale University Press.

The directive force of a principle may be exerted along the line of logical progression; and this I will call the rule of analogy or the method of philosophy. * * * Let me give some haphazard illustrations of conclusions adopted by our law through the development of legal conceptions to logical conclusions. A agrees to sell a chattel to B. Before title passes, the chattel is destroyed. The loss falls on the seller who has sued at law for the price. A agrees to sell a house and lot. Before title passes, the house is destroyed. The seller sues in equity for specific performance. The loss falls upon the buyer. That is probably the prevailing view, though its wisdom has been sharply criticized. These variant conclusions are not dictated by variant considerations of policy or justice. They are projections of a principle to its logical outcome, or the outcome supposed to be logical. Equity treats that as done which ought to be done. Contracts for the sale of land, unlike most contracts for the sale of chattels, are within the jurisdiction of equity. The vendee is in equity the owner from the beginning. Therefore, the burdens as well as the benefits of ownership shall be his. * * * The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of *Riggs v. Palmer*, 115 N. Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. The principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led

to justice. Analogies and precedents and principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. I am not greatly concerned about the particular formula through which justice was attained. Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust. A constructive trust is nothing but "the formula through which the conscience of equity finds expression." Property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee. Such formulas are merely the remedial devices by which a result conceived of as right and just is made to square with principle and with the symmetry of the legal system. What concerns me now is not the remedial device, but rather the underlying motive, the indwelling, creative energy, which brings such devices into play. The murderer lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership. My illustration, indeed, has brought me ahead of my story. The judicial process is there in microcosm. We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go.

What Cardozo observed as to the role of judicial precedent (*stare decisis*) would seem to apply to the role of legislative precedent (*stare de statute*).² When a court, for example, is considering whether a legislative measure is "reasonable", and therefore not violative of the "due process" clause of the Constitution, the force of legislative precedent, e. g. that other jurisdictions have adopted a similar legislative policy without any harmful consequences, may well soften what, at first blush, might be taken as dangerous innovation. Being bottomed on tradition, on habit, on past performance, legislative precedents,—like judicial precedents—make their appeal to the conservatism of a court

² For this expression, I am indebted to Professor Frank E. Horack, Jr. See his article, *The Common Law of Legislation* (1937), 23 *Iowa L. Rev.* 41, part of which is reproduced *infra*, at page 433.

suspicious of innovation and change.³ Note, for example, in the following pages, how skillfully legislative precedents were employed to this end by Brandeis in his famous brief in *Muller v. Oregon*, where the issue before the court was the constitutionality of the Oregon minimum hours of labor law for women.

What Cardozo observed as to the role of judicial analogy would also seem to apply, at least in part, to the role of legislative analogy. For just as there are basic "postulates of judicial reasoning" behind the cases, so there are basic postulates of community values, of "habits of life, the institutions of society" behind the statutes. And just as "cases do not unfold their principles for the asking", so the principles behind statutes also "yield up their kernel slowly and painfully." But once they have been extracted, the directive force of statutes, as of cases, "may be exerted along the line of logical progression." And with statutes—just as with cases—"the directive force of [the] logic [of their postulates] does not always exert itself along a single and unobstructed path," and a choice between the several paths will have to be made. In many civil law code countries, this "exertion" of statutes "along the line of logical progression" has been a normal procedure in the courts—statutes being regarded as principles from which to reason, and not rules for dealing with specific fact situations. In this country—due in no small measure to the antipathy of our common law courts towards legislative innovation—the tendency has been the other way. Statutes in this country came "to be regarded as furnishing rules for particular, definite situations, but not principles for cases not within their tenor or from which to reason by analogy."⁴ Dean Pound summarized our position this way:

Four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to

³ Note the significant observation of Mr. Justice Frankfurter in his article, *Some Reflections on the Reading of Statutes*, 41 Col. L. Rev. 535 (1947): "For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty."

⁴ Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 389 (1908).

reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. The fourth hypothesis represents the orthodox common law attitude toward legislative innovations. Probably the third hypothesis, however, represents more nearly the attitude toward which we are tending. The second and first hypothesis doubtless appeal to the common law lawyer as absurd. He can hardly conceive that a rule of statutory origin may be treated as a permanent part of the general body of the law. But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis.⁵

But not only have there been proponents who, with Dean Pound, would urge that at least the "second hypothesis" be followed in this country (witness the following views of Professor Landis)—there is evidence (witness the following case materials) that the adoption of the "second hypothesis" might be on its way, though the pace would seem to be slow. Let us see how it has been used in actual practice and what it might yield as a weapon of advocacy. It will be helpful for purposes of class discussion to study the case and other materials in this Chapter with an eye towards ascertaining how, if at all, the methods of legislative precedent and analogy parallel the methods of judicial precedent and analogy portrayed by Mr. Justice Cardozo in the quoted portions of his "The Nature of the Judicial Process."⁶

B. BACKGROUND MATERIAL

JAMES M. LANDIS, STATUTES AND THE SOURCES OF LAW (1934)⁷

Harvard Legal Essays 213, 230-233

* * *

* * * Instead of treating statutory materials in an isolated fashion, care and imagination in handling them, such as is customary in dealing with judicial precedents, may produce fruitful results. Coordinating existing legal institutions with statutory aims surely is as significant as correlating them with

⁵ *Ibid.*, 385.

⁶ Although some of the cases in this Chapter could readily be subsumed under Chapter 2 to exemplify the process of "Ascertaining the 'Meaning' of Ambiguous Legislation," they have been grouped with materials not involving the problem of "meaning" in order to demonstrate that not only judicial but legislative precedents and analogies might fruitfully be employed by the advocate.

⁷ Reprinted with the permission of the Harvard University Press and James M. Landis.

conceptions spun from the odds and ends of judicial logic. And like judge-made law, the territorial relevance of statutes is not to be too closely circumscribed. The comparative technique is important to a perception of their wider import. Judges alive to the necessity of making law adequate to the needs of a new continent did not hesitate to draw upon the "benign spirit of English legislation."

The interplay between legislation and adjudication has been generally explored from the standpoint of interpretation. The function of the legislature as, in essence, a supreme court of appeal constantly busying itself with correcting the aberrations of the judicial process, has been largely ignored. Cases, so far as their doctrinal content go, are overruled at almost every legislative session. The deeper import of such action has yet to be appreciated. A decent respect for the legislative process would strike a more favorable balance between legislative and judicial development of law.

One phase of the problem assumes importance especially in a nation with forty-eight coordinate but common legal systems. One jurisdiction faced with the same problem earlier decided by another jurisdiction has to weigh the significance to be attached to a statute repudiating the judicial solution made of the problem. To the narrow traditionalist the statute itself is a datum which reinforces the fact that the overruled decision is evidence of the common law, and so error perpetuates itself. But the simplicity of such a conception of the common law is slowly passing. A better understanding now exists of the nature of the judicial process and the nicety of the choices that sway judgment and thus result in law. Plainly, then, the statute is pertinent. Bench and bar have been prone to neglect this aspect of legislation. Cases are relied upon as authoritative without cognizance of the fact that in the jurisdiction that gave them birth they have already been repudiated. An editorial criticism of a decision is relied upon as an excuse for refusing to follow it, while the judgment of a legislature overturning its effect is neglected. Judicial reversals avowedly based upon the social inexpediency of the earlier conclusion stifle its germinating powers, but the same sober judgment of a representative assembly merely adds virulence to the poison of judicial unwisdom. * * *

This has not always been true. When in 1863 the Supreme Judicial Court of Massachusetts had to determine whether a general devise operated to execute a power of appointment vested in the testator, the Court turned its back upon the common-law authorities that refused to accord the devise such an effect. Instead, awake to the inequities of the common-law rule and conscious of its abrogation by the Wills Act of 1837, the Court chose

the legislative solution, convinced that "the rule of the English statute appears to us the wiser and safer rule." Similarly New York, where the statutory revisers had already incorporated the rule of the Wills Act but applied it in terms only to realty, extended the statutory doctrine to cover dispositions of personalty. Needless legislation had to be invoked in other states to overturn decisions of their courts, whose traditionalism had led them to adhere to the common-law rule.

* * *

Characteristics of the modern legislative process serve to increase the importance of such a technique. Judicial councils exist with the function of acting as ministries of justice to call to the attention of the legislature weaknesses in existing judge-made law. Their recommendations, when translated into statutes, ought to possess great persuasive value. Expert legislative draftsmen are commonly attached to legislatures, their counsels operating to prevent the unfortunate incidence that characterized the legislation of early democratic assemblies. In the light of changes that modern juristic thinking has wrought in the nature and sources of law, judicial precedents are assuming a less coercive quality. If it be true that law reflects and should reflect experience rather than logic, legislation born of such an urge demands careful and sympathetic consideration.

The present attitude responsible for our cavalier treatment of legislation is certain to be a passing phenomenon. The consciousness that the judicial and legislative processes are closely allied both in technique and in aims will inevitably make for greater interdependence in both. The beginnings of such a movement are already clearly discernible in the process of statutory interpretation where courts, returning to an earlier attitude, seek to interpret expressions of policy in the light of the manifold circumstances responsible for the statutory formulation. Grammatical interpretation is giving way to functional construction. The distrust of legislative intervention is subsiding with the important advances made in the mechanics of law-making. Our prevailing philosophy makes us less certain that we have seized upon universals, and the search for pragmatic truth carries us naturally to seek for wisdom in the many sources of experience. Black-letter learning has rarely been characteristic of the legislative process, and its importance to adjudication is disappearing with the rise of the social scientific method. And the consciousness that that method, though often in its crudest form, underlies legislation makes for tolerance with the product.

C. LEGISLATIVE PRECEDENT IN JUDICIAL ADVOCACY**Excerpts From the Brief of Louis D. Brandeis
in Muller v. Oregon****SUPREME COURT OF THE UNITED STATES
October Term 1907**

CURT MULLER, Plaintiff in Error,
v.

THE STATE OF OREGON, Defendant in Error
BRIEF FOR DEFENDANT IN ERROR

This case presents the single question whether the Statute of Oregon, approved Feb. 19, 1903, which provides that "no female [shall] be employed in any mechanical establishment or factory or laundry" "more than ten hours during any one day," is unconstitutional and void as violating the Fourteenth Amendment of the Federal Constitution.

The decision in this case will, in effect, determine the constitutionality of nearly all the statutes in force in the United States, limiting the hours of labor of adult women,—namely: [Brandeis here sets forth the statutes of nineteen states relating to the limitation of the hours at labor of adult women.]

* * *

Argument

The legal rules applicable to this case are few and are well established, namely:

First: The right to purchase or to sell labor is a part of the "liberty" protected by the Fourteenth Amendment of the Federal Constitution. *Lochner v. New York*, 198 U. S. 45, 53, 49 L. ed. 937, 25 S. Ct. 539.

Second: This right to "liberty" is, however, subject to such reasonable restraint of action as the State may impose in the exercise of the police power for the protection of health, safety, morals, and the general welfare. *Lochner v. New York*, 198 U. S. 45, 53, 67, 49 L. ed. 937, 25 S. Ct. 539.

Third: The mere assertion that a statute restricting "liberty" relates, though in a remote degree, to the public health, safety, or welfare does not render it valid. The act must have a "real or substantial relation to the protection of the public health and the public safety." *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 49 L. ed. 643, 25 S. Ct. 358.

It must have "a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate." *Lochner v. New York*, 198 U. S. 45, 56, 57, 61, 49 L. ed. 937, 25 S. Ct. 539.

Fourth: Such a law will not be sustained if the Court can see that it has no real or substantial relation to public health,

safety, or welfare, or that it is "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."

But "If the end which the Legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the Court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assail it." *Lochner v. New York*, 198 U. S. 45-68, 49 L. ed. 937, 25 S. Ct. 539.

Fifth: The validity of the Oregon statute must therefore be sustained unless the Court can find that there is no "fair ground, reasonable in and of itself, to say that there is material danger to the public health (or safety), or to the health (or safety) of the employees (or to the general welfare), if the hours of labor are not curtailed. *Lochner v. New York*, 198 U. S. 45, 61, 49 L. ed. 937, 25 S. Ct. 539.

The Oregon statute was obviously enacted for the purpose of protecting the public health, safety, and welfare. Indeed it declares:

"Section 5. Inasmuch as the female employees in the various establishments are not protected from overwork, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its approval by the Governor."

The facts of common knowledge of which the Court may take judicial notice—(See *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358; *Lochner v. New York*, 198 U. S. 481, 49 L. ed. 937, 25 S. Ct. 539.) establish, we submit, conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a "mechanical establishment, or factory, or laundry" more than ten hours in one day is dangerous to the public health, safety, morals, or welfare.

These facts of common knowledge will be considered under the following heads:

Part I. Legislation (foreign and American), restricting the hours of labor for women.

Part II. The world's experience upon which the legislation limiting the hours of labor for women is based.

PART FIRST

LEGISLATION RESTRICTING THE HOURS OF LABOR FOR WOMEN

I. The Foreign Legislation

The leading countries in Europe in which women are largely employed in factory or similar work have found it necessary to

take action for the protection of their health and safety and the public welfare, and have enacted laws limiting the hours of labor for adult women.

About two generations have elapsed since the enactment of the first law. In no country in which the legal limitation upon the hours of labor of adult women was introduced has the law been repealed. Practically without exception every amendment of the law has been in the line of strengthening the law or further reducing the working time.

(a) Great Britain

First law enacted in 1844. The British law of 1844 was the first statute in any country limiting the hours of labor for adult women. It simply extended to women the provisions of the Act of 1833, which had restricted the work of children in textile mills to twelve hours per day. In 1847 the legal working time for women as well as children in textile mills was reduced to ten hours per day. By further legislation in 1867, 1878, 1891, and 1901 further restrictions were introduced. The law, subject to certain exceptions allowing overtime, is in substance as follows (Law of 1901, 1 Edw. VII. ch. 22) :

Hours.

Textile Factories. (Sec. 24.)

The period of employment, except on Saturday, shall either begin at 6 A. M. and end at 6 P. M., or begin 7 A. M. and end at 7 P. M.

There shall be allowed for meals during said period of employment on every day except Saturday not less than two hours, of which one hour at the least shall be before 3 P. M.

Special regulations for a shorter day on Saturdays.

Non-textile Factories and Workshops. (Sec. 26)

The period of employment, except on Saturdays, shall either begin at 6 A. M. and end at 6 P. M., or begin at 7 A. M. and end at 7 P. M., or begin at 8 A. M. and end at 8 P. M.

There shall be allowed for meals during the said period of employment on every day except Saturday not less than one and one-half hours, of which one hour at the least shall be before 3 P. M.

Special regulations for a shorter work-day on Saturdays.

In a Workshop which does not employ Children or Young People.

(Sec 29.)

The period of employment shall, except on Saturdays, be a specified period of twelve hours taken between 6 A. M. and 10 P. M.

There shall be allowed to a woman for meals and absence from work during the period of employment not less than one and one-half hours.

(b) France

The law of 1848, as amended by Act of November 2, 1892, and March 30, 1900, which became operative in 1904, provides in substance:

Hours of Labor (in industrial establishments).

The maximum length of the working day shall be ten hours (art. 3, sec. 2) broken by at least one hour of rest. (Art. 3, sec. 1.)

Overtime may be granted by departmental decrees for two hours in one day, during not more than sixty days in the year, for certain trades, chiefly season trades. (Art. 4, sec. 4) By departmental decrees employment of women may be prohibited or regulated in trades considered dangerous to health or morals. (Arts. 12 and 13.)

(c) Switzerland

The Canton of Glarus enacted in 1848 a law limiting the hours of labor to thirteen in one day. In 1864, this limit was reduced to twelve hours, and in 1872 it was further reduced to eleven hours. The Town of Basel enacted in 1869 a law limiting the hours of labor to twelve in one day.

The Canton of Ticino enacted in 1873 a law limiting the hours of labor to twelve in one day.

The Federal Swiss Constitution of 1874 provided:

Article 34: The Confederation has the right to make uniform prescription * * * concerning the duration of labor which may be required of adults.

The Federal law enacted in 1877 provides:

Hours of Labor (in industrial establishments).

The daily hours of work shall not exceed eleven hours in one day, and shall not exceed ten hours on the days before Sundays or holidays.

These working hours must be broken by a rest of at least one hour at noon; one and one-half hours for women who have to attend to household. (Art. 2, sec. 1.)

Overtime may be granted by the separate cantons for fixed times and fixed hours.

All the cantons have the same restriction of hours as is fixed by the Federal law except Zurich (Law of 1894).

Hours of Labor (in industrial establishments).

The daily hours of labor shall not exceed ten hours in one day, and shall not exceed nine hours on the days before Sundays and holidays.

Overtime allowed for two hours in the day during seventy-five days in the year for various causes, such as season trades, press of work, etc. (Art. 9-16).

(d) Austria

First law enacted in 1885; as amended by Acts of 1897, provides, in substance:

Hours of Labor (in factories and workshops).

Women shall not be employed more than eleven hours in one day. (Art. 96a, secs. 1-3.)

These working hours must be broken by rests amounting to one and one-half hours, one hour of which is allowed at noon. (Art. 74a.)

Overtime for one hour in the day may be granted by the Ministers of Commerce and of the Interior for certain trades, the list of which must be revised every three years. (Art. 96a, sec. 1-3.)

The Ministers may prohibit or regulate employment of women in trades held dangerous to health.

(e) Holland

First law enacted in 1889 provides as follows:

Hours of Labor (in factories and workshops).

The daily hours of labor shall not exceed eleven hours in one day. (Art. 5, sec. 1.)

Between 11 A. M. and 3 P. M. a rest of at least one hour must be allowed. (Art. 6.)

Overtime may be granted by the provincial governors, allowing a thirteen-hour day for at most six consecutive days, or on alternative days during two weeks. (Art. 5, sec. 3.)

By royal decree employment of women may be prohibited or regulated in trades held dangerous to health.

(f) Italy

The law of June 19, 1902, provides in substance:

Hours of Labor.

Women shall not be employed more than twelve hours in one day. (Art. 7.)

The day's work shall be broken by one or more rests amounting to one and one-half hours in a day of from eight to eleven hours, and amounting to two hours in a day of more than eleven hours. (Art. 8.)

(g) Germany

The law of 1891 provides in substance:

Hours of Labor (in industrial establishments).

Women shall not be employed more than eleven hours in one day, and not more than ten hours on the days before Sundays or holidays.

These working hours must be broken by a rest of at least one hour at noon, or one and one-half hours for women who have to attend to a household.

Overtime may be granted by the lower administrative authority for not more than thirteen hours of labor in one day, during two weeks, not more than forty days in the year. (Art. 138a, secs. 1-3.)

In case of accidents the higher administrative authority may allow overtime without any restriction of hours during four weeks, the Chancellor of the Empire for any longer period. (Art. 139, sec. 1.)

The Bundesrat may grant overtime for special trades. (Art. 139a, sec. 1 and 2.)

The Bundesrat may prohibit or regulate employment of women in trades held dangerous to health or morals. (Art. 139a, sec. 1.)

II. The American Legislation

Twenty States of the Union, including nearly all of those in which women are largely employed in factory or similar work, have found it necessary to take action for the protection of their health and safety and the public welfare, and have enacted laws limiting the hours of labor for adult women.

This legislation has not been the result of sudden impulse or passing humor,—it has followed deliberate consideration, and been adopted in the face of much opposition. More than a generation has elapsed between the earliest and the latest of these acts.

In no instance has any such law been repealed. Nearly every amendment in any law has been in the line of strengthening the law or further reducing the working time.

The earliest statute in the United States which undertook to limit the hours of labor for women in mechanical or manufacturing establishments was Wisconsin Statute, 1867, chap. 83, which fixed the hours of labor as eight. The act, however, provided a penalty only in case of compelling a woman to work longer hours.

The earliest act which effectively restricted the hours of labor for women was Massachusetts Statute, 1874, chap. 34, which fixed the limit at ten hours. The passage of the Massachusetts Act was preceded by prolonged agitation and repeated official in-

vestigations. The first legislative inquiry was made as early as 1865.

After the Massachusetts Act had been in force six years, an elaborate investigation of its economic effects was undertaken by the Massachusetts Bureau of Labor Statistics, under the supervision of its chief, Mr. Carroll D. Wright. His report, published in 1881 (Twelfth Annual Report of the Massachusetts Bureau of Statistics of Labor), to the effect that the reduction of the hours of labor had not resulted in increasing the cost or reducing wages, led to the passage, in 1885 and 1887, of the ten-hour law for women in Rhode Island, Maine, New Hampshire, and Connecticut, and largely influenced the legislation in other States.

In the United States, as in foreign countries, there has been a general movement to strengthen and to extend the operation of these laws. In no State has any such law been held unconstitutional, except in Illinois, where, in *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, the Act of June 17, 1893, entitled "An Act to regulate the manufacture of clothing, wearing apparel, and other articles in this State," etc., was held unconstitutional. That act provided (sec. 5) that "No female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week."

MULLER v. OREGON

208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324 (1908)

Mr. Justice BREWER * * *

* * *

* * * It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, * * *

* * *

The legislation and opinions referred to may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar

value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

* * *

D. LEGISLATIVE PRECEDENT IN LEGISLATIVE ADVOCACY

Note

Couched in technical legal language, the issue in *Muller v. Oregon* was whether a state law regulating hours of labor violated the due process clause of the Fourteenth Amendment. In practical terms, however, the issue was whether the legislation in question was reasonable; and it was the court that had to be convinced. To help establish the reasonableness of the legislation, Brandeis made use of legislative precedent ("*stare de statute*")—presumably for the same reason that lawyers make use of case precedent (*stare decisis*). Both are bottomed on habit and tradition; both take the sting out of innovation; both appeal to the conservatism of institutions responsible for policy decisions. When one appears as an advocate in the legislative arena—for example, to urge a legislative committee to give favorable consideration to a legislative proposal, one also is engaged in making a case for the reasonableness of legislation. In this task, legislative precedent also may be used to advantage to soften what otherwise might appear as innovation.

Examples

Note, for example, how it was employed in the following argument before a Senate Committee considering a proposal to strengthen the 1906 Food and Drug Act by authorizing the issuance by the Food and Drug Administrator of administrative regulations having the force and effect of law:*

A great deal of criticism has been advanced against section 22, providing * * * authorizing the promulgation of regulations having the force and effect of law. Listening to these criticisms, one would infer that this is a unique departure in American legislation. On the contrary, there is ample precedent in both Federal and State

* Statement of W. G. Campbell, Senate Hearings before the Committee on Commerce on S. 2800, 73rd Cong. 2d Sess. pp. 605-606 (1934).

statutes of recent date for the delegation of this quasi-legislative power. Some of the Federal statutes are the Clayton Act, the Federal Trade Commission Act, the Longshoremen's and Harbor Workers' Compensation Act, the Packers and Stockyards Act, the Grain Futures Act, the United States Grain Standards Act, and the Tariff Act. Furthermore, authority to make findings and regulations having the force and effect of law are conferred upon the Secretary by the McNary-Mapes amendment to the existing food and drugs act. In those instances in this bill where the regulation-making power has been delegated, the limits within which such power may be exercised have been definitely delineated. The questions involved are so complicated and so subject to change with scientific developments that it would be wholly impracticable to treat them by specific legislative formulae. They deal with matters of such moment to the public health and to the protection of consumer welfare generally that the statute would be woefully deficient unless it made some such provision as this for the curtailment of abuses that cannot otherwise be reached.

Even during the heated controversies which antedated the passage of the Food and Drug Act of 1906, there was resort to legislative precedent—presumably to establish the fact that governmental regulation of the manufacturing and distribution of food and drugs in the interest of the consuming population was not a startlingly new venture. In a Report prepared for the Senate Committee on Manufactures,⁹ which was considering the need for federal regulation, the laws of the various states and foreign countries were assembled and utilized much in the same way that Brandeis assembled and utilized them in his *Muller v. Oregon* brief. In citing the experiences in England, France, Germany, Rumania, etc., there was reference to the fact that these countries regulated food and drugs by "general law"—presumably to suggest that comprehensive national legislation was already in operation in other civilized countries—and without any apparent ill effects.

Difficulties in Tracing the Pattern of Legislative Precedent

FRANK E. HORACK, JR., THE COMMON LAW OF LEGISLATION

23 Iowa Law Review 41, 42-45, 56 (1937)¹⁰

* * *

The function of precedent in judge-made law has been discussed elaborately; its similar functions in legislation has been

⁹ Digest of the Pure Food and Drug Laws of the United States and Foreign Countries, Sen. Rep. No. 3, 47th Cong. 1st Sess. (1901).

¹⁰ Reprinted with the permission of the Iowa Law Review.

ignored. Nevertheless, legislation, like judge-made law, follows precedent. Save for formal difference of structure, legislation and adjudication spring from similar patterns of human conduct.

Habit and essential caution of the human mind seek the easy comfort of past decisions and abjures responsibility for new determinations. Consequently, whether the decision involves changing the color of one's house, the breakfast menu, a judge-made rule of tort liability, or a statutory amendment, experience will find friendly reception. But the law of statutory precedents must be looked for, not in the courts, but in the legislative acts. The search is, of course, more perilous and the discoveries more difficult, for legislative assemblies have lost the art of argument and fail to "explain" their decisions. Their books have only the decisions, but behind each decision there will be found a reason.

* * *

Statutory precedent grows as case-precedent grows. First, someone bolder than the rest marks a new course. If the course appears satisfactory, others follow. Legal science calls this the doctrine of *stare decisis*. The legislative process is similar. For example, the common-law rule prior to legislative change was that the operator of an automobile owed a duty to an invited guest to exercise due care to protect the guest from unreasonable danger of injury. * * * When this seemed to provide an undesirable stimulus to hitch-hiking and to assist collusion between guest and host for the recovery of insurance, legislative change was thought to be desirable. Connecticut adopted a statute relieving the operator from liability to a guest, except for "wilful or wanton conduct." Twenty-three states followed that lead. Described in juristic language, the legislatures have followed the rules of precedent. In popular language, the statute has been copied. The result is the same.

Additional legislation has been adopted by seven states further to protect society from the dangers of hitch-hiking. In these states hitch-hiking has been made a crime. The legislative intent is clear. It is doubtful, of course, whether such regulation will be of practical utility in reducing hitch-hiking. But this is no objection. Judicial decision has never been criticized because it fails to stop litigation. The significant point is that in adopting these statutes legislatures have followed a system remarkably similar to that of judicial precedent. It may be objected that the legislature, not having explained its result, need not feel bound by the statutes of other states. This is, indeed, true. But the statute tells but half the story. If the committee reports, the hearings, and the debates, accompanied every statute, the procedure would be apparent. Important

present-day legislation is no longer of "wild and sporadic growth."

* * *

Stare decisis provides courts and litigants a fair standard for the prediction of future judicial action; *stare de statute* enables legislators, public administrators, and those privately interested in legislative development to predict within similar degrees of error the development of statutory rule. It is as Bentham suggested, an understanding of the mores, prejudices and past experience of a people that will provide the key for the prediction of statute law. Legislation develops in an orderly manner.

* * *

Perhaps the greatest difficulty in advancing the thesis of consistence and order in legislative policy is the inability to make readily available the course and pattern of legislative precedent. Today it is little more than a realization of those persons who have had close contact with the activity of legislatures. * * *

* * *

* * * The hard work necessary to search through legislative volumes without the aid of digest or index appears too much a task for Hercules. And yet, until the host of statutes which fill in the gaps of case-law [are considered in the classroom] * * * the law graduate will enter his profession only partially equipped. * * * The day is already at hand, at least in the constitutional field, when the successful practitioner must be as well versed in legislative history as he is in case precedent. The demands of tomorrow will place on lawyers the burden of directing the orderly development of legislation, the correlation of administration with that policy, and the sympathetic review of that policy by the courts. If the lawyer of tomorrow adequately fulfills this responsibility he must be trained in a system of jurisprudence that excludes none of its potential materials. He must be able to synthesize statutes, administrative rulings, and judicial decisions into a consistent jurisprudence. * * *

E. LEGISLATIVE ANALOGY IN JUDICIAL ADVOCACY

ERNST FREUND, INTERPRETATION OF STATUTES (1917) ¹¹

65 U. of Pennsylvania L. Rev. 207, 225-226, 228-231

* * *

The true problem of analogy may be stated this way: a statute has altered common law principles with reference to

¹¹ Reprinted with the permission of the University of Pennsylvania Law Review.

one relation; another relation not covered by the terms of the statute involves the same or similar principles; can the new relation be said to be within the spirit though not within the letter of the statute? The principle of literalness stands in the way, or, to put it in another way, most statutes deal with principles only in the form of rules, and a principle is flexible while a rule is not. The law of prescription is in America common law and expresses a principle with regard to easements analogous to the principle involved in the statute of limitations which applies to corporeal hereditaments; the traditional period of the statute of limitations having been twenty years, such is also the common law period of prescription. If the period of limitation is by statute reduced to fifteen years, the courts correspondingly reduce the time for prescription. But if the period of prescription is fixed by statute, as it is in England (1832), it does not alter automatically by a reduction of the period of the statute of limitations from twenty to twelve.

* * *

* * * In certain cases it might be urged that an analogous extension of statutes is demanded in order to prevent fraud. The type of cases is that a statutory prohibition is circumvented by adopting an equivalent arrangement not covered by the terms of the statute. E. g., the law forbids a married woman to dispose by will of more than one-half of her personal property without her husband's consent; the married woman makes a gift *mortis causa* of substantially all her personal property; this is held not to be within the prohibition of the statute. A general doctrine making fraud upon statutory rights illegal would cover this point, and substantially would in many cases lead to an analogous extension of statutes; but there is no such doctrine known to our law, or in other words, it is considered legitimate to evade, if possible, the effect of a statute, by keeping outside of its terms, although what is done violates its spirit.

* * *

* * *

* * * The French law offers some very striking instances of the development of code provisions on the basis of analogy. Thus Article 1423 of the Code Civil authorizes the husband to dispose by will of his share of the community property; the like authority is accorded to the wife by French "jurisprudence." Article 109 of the Commercial Code allows purchase and sale to be proved by witnesses in the discretion of the court; judicial practice has extended this to commercial transactions generally. The Commercial Code makes bills of exchange negotiable; in practice negotiability is extended to other securities. * * * But generally speaking, it may be contended that principles of interpretation which are suitable to statutes in a system of un-

written law are not necessarily applicable to a code; for a code is apt to lay down principles rather than rules, and if a code abrogates the older common law, its inevitable gaps must necessarily be filled by judicial construction, and some codes expressly refer to analogy as a guide. Only for the criminal codes this principle seems now generally repudiated ("*nulla poena sine lege*") ; we find analogy first expressly excluded by the Austrian Criminal Code of 1787.

Conceding that this spirit of interpretation is part and parcel of our law, it may yet be urged that in cases of genuine ambiguity courts should use the power of interpretation consciously and deliberately to promote sound law and sound principles of legislation. That object is far more important than a painstaking fidelity to the supposed legislative intent. This intent is in reality often a fiction, and the legislature is fully aware that any but the most explicit language is subject to the judicial power of interpretation. That power might, therefore, as well be frankly and vigorously used as a legitimate instrument of legal development and of balancing legislative inadvertence by judicial deliberation. English and American legal sentiment, however, is decidedly against the exercise of such judicial power. * * *

CASE MATERIALS

MARTIN v. ROBSON

65 Ill. 129, 16 Am. Rep. 578 (1872)

* * *

Action on the case by the appellee against Margaret Martin and John Martin, her husband. The plaintiff recovered a verdict for slanderous words spoken by Margaret Martin. The opinion states the case. The statutes, the effect of which are involved, are as follows:

Laws of 1861: "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman, hereafter married, owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person, other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profit thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

Laws of 1869: "A married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her

name, free from interference of her husband or his creditors. *Provided*, this act shall not be construed to give to the wife any right to compensation for any labor performed for her minor children or husband."

THORNTON, J. Since the passage of the acts of 1861 and 1869, is the husband liable for the torts of the wife during coverture, committed when he was not present, and in which he in no manner participated?

Those statutes give to the wife, during coverture, the sole control of her separate estate and property acquired in good faith from any person other than her husband, and her own earnings for labor performed for any person other than her husband or minor children, with the right to use and possess the property and earnings, free from the control or interference of her husband.

In determining the intent, object and effect of these enactments, it will be interesting to place, in juxtaposition, the rights and duties, liabilities and disabilities of husband and wife, incident to the marriage union, as they existed at common law, and the changes made by the statute.

At common law he had control, almost absolute, over her person; was entitled, as the result of the marriage, to her services, and, consequently, to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession, during her life; could collect and enjoy the rents and profits of her real estate; and thus had dominion over her property, and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him; and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law.

As a necessary consequence, he was liable for the debts of the wife *dum sola*, and for her torts and frauds committed during coverture. If they were done in his presence, or by his procurement, he alone was liable; otherwise they must be jointly sued.

Now, he cannot enjoy the benefits of her real estate without her permission. He has no control over her separate personal property. It is not subject to his "disposal, control or interference." Language could not be more explicit. All her separate property is "under her sole control, to be held, owned, possessed and enjoined by her the same as though she was sole and unmarried." He has no right to use or dispose of a horse or a cow, without her consent. He can no longer interfere with her choses in action. They are under her sole control. The product of her labor is her exclusive property. She alone can sue for and enjoy it. Any suit for her earnings must be in her own name, and she

may use and possess them free from the interference of her husband or his creditors.

The language of the statute of 1869 is: "That a married woman shall be entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband."

The words, "free from the interference of her husband," apply as well to the right to receive, use and possess, as to the right to sue for her earnings. The right, therefore, to receive and use her own earnings, uncontrolled by the husband, is conferred in express terms. The practical enjoyment of this right presupposes the right to appropriate her own time. The right to take and possess the wages of labor must be accompanied with the right to labor. If the husband can control, then the statute has conferred a barren right. If the wife can still only acquire earnings with his consent, then the statute was wholly unnecessary, for she might have done this prior to its enactment. The clear intent of the statute is, not alone to give to the wife the right to accept and use her earnings, but the right to labor and thus acquire them.

The intention of the legislature to abrogate the common-law rule, to a great degree, that husband and wife were one person, and to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common-law rule, that the husband is liable for the torts of the wife, they have made such modification of his rights and her disabilities, as wholly to remove the reason for the liability.

* * *

A liability which has for its consideration rights conferred, should no longer exist when the consideration has failed. If the relations of husband and wife have been so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated, to hold him still responsible for her conduct. If she is emancipated, he should not longer be enslaved.

For the policy and wisdom of the legislation which has effected a change so radical, the legislature alone is responsible. * * *

* * *

Our opinion is, that the necessary operation of the statutes is to discharge the husband from his liability for the torts of his wife, during coverture, which he neither aided, advised nor countenanced.

The judgment is reversed and the cause remanded.

In Re TYLER'S ESTATE

140 Wash. 679, 250 Pac. 456 (1926)

* * * From an order setting off to Percy B. Tyler, as surviving husband, property from her separate estate, Ida Spangler, administratrix of the estate of Anna L. Tyler, deceased, and others, appeal. * * *

* * *

HOLCOMB, J. From an order in probate proceedings setting over to respondent \$3,000 worth of property out of the separate estate of his deceased wife under the provisions of section 1473, Rem. Comp. Stats., as amended by section 2, c. 142, of the Laws of 1923, entered in the court below, this appeal is taken.

On November 10, 1924, respondent murdered his wife. On January 5, 1925, Ida S. Spangler was appointed administratrix of the estate of Anna L. Tyler, deceased. Prior to the filing of the petition by respondent to have the property set over to him in lieu of homestead, he had been tried, convicted, sentenced, and committed to life imprisonment. An affirmative answer to the petition was filed by appellants alleging the above facts and that respondent killed his wife for the purpose of securing the property. A demurrer to the affirmative answer was sustained.

The question to decide is whether an uxoricide killing his wife for the purpose of getting possession of her separate property is entitled to the benefit of the above-cited statute. In that statute it is provided:

"If it shall be made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court," upon such notice as may be determined by the court, "upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of three thousand dollars (\$3,000). * * * The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud. The awards in this section provided shall be in lieu of all homestead provisions of the law and of exemptions."

By the express terms of this statute the apparent duty of the court is to award and set off to the surviving spouse the amount of property therein mentioned in lieu of homestead provisions of the law and all exemptions. The only exception provided for in the statute is that of fraud. But the apparent duty above

stated must be construed in connection with other statutory provisions and principles in such a case as this. * * *

It is so offensive to good conscience, repugnant to justice, and revolting to the mind of every right-thinking person that one should come into court with bloody hands and receive as it were a reward for his iniquity that we cannot conceive that the Legislature composed of persons of good sense and integrity should ever have intended, in enacting the statute and its amendment, that such consummation could be accomplished. It must be true that such a state of facts as appear in this case was not in the mind of the Legislature at the time the statutes were passed.

It is argued on behalf of respondent, in effect, with which the trial court agreed, that the courts must give effect to the language of the statute as written, it being plain and unambiguous; that to construe this statute so that it would provide that one as in the present case should not benefit by his own crime would be to judicially interpret into the statute a provision not there found. It is also declared that it cannot be said that the Legislature did not have in mind the making of exceptions, because it provided against fraud.

We are compelled to admit that a majority of the courts which have passed upon similar questions have held that the court has no power to write into an unambiguous law an exception which would prevent one from benefiting by his criminal act, when the Legislature has not so provided. Some of the cases which have been examined have dealt with statutes upon insurance policies where the beneficiary by homicide killed the insured so as to more speedily come into the money. Others have been upon statutes of inheritance or descent, where one has killed a person whose property had been willed to, or would descend to him, in order more speedily to come into the estate.

* * *

It seems to us that there was in all of those cases a too literal, submissive, and complacent acceptance of the bare language of the one statute, rather than fundamental principles of the common law and other written law.

In this state there is also a general statute (section 143, Rem. Comp. Stats.) which is pertinent. It provides:

"The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

We have held that any law in derogation of the common law should be strictly construed. * * *

Section 1473, *supra*, on which respondent relies, is manifestly in derogation of the common law, for at common law the estate of the deceased would have passed to her heirs upon her death, and not have been awarded to respondent in lieu of homestead.

While it is true that this statute nowhere specifically provides that the rule or doctrine of the common law should apply which precludes a murderer from inheriting from his victim, it is inconceivable that the Legislature would intentionally enact a law whereby the murderer should so take.

The New York Court of Appeals decided in *Riggs v. Palmer*, 115 N. Y. 506; 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, that a murderer cannot take there, as legatee or heir, the estate of one whom he has murdered for the purpose of obtaining the property. It was well observed:

"Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. * * * These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with the estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime?"

And so in the case at bar, under the allegations of the petition, the murderer killed his wife so that he could possess himself of her property. The Legislature, thinking of course, of the most common acts and conduct of mankind provided only the exception for fraud, but is it to be supposed that, when providing against fraud as an exception in which the award should not be granted, it had in mind that the much blacker act and crime, homicide, should not bar one from taking the property as a homestead, while a mere fraud should? Such a supposition is unthinkable.

* * *

To allow respondent to reap the reward of his intentional homicide by granting him the separate property of his murdered wife is so utterly opposed to justice, good conscience, morals, and the maxims of the common law which are a part of the law

of the land in force in this state that we are utterly unable to assent thereto.

The judgment is reversed, with instructions to overrule the demurrer to appellant's answer to respondent's petition, receive evidence in support of the answer, and proceed further in accordance herewith.

* * *

PARKER, J. (dissenting). I dissent. The statute in question is plain. It contains no exceptions. The only loss of rights visited by law upon respondent for his crime is that prescribed by our homicide criminal statute; that is, loss of life or liberty as may have been adjudged against him in his prosecution for the commission of his crime. I think the majority opinion is, in its effect, unwarranted judicial legislation as to my mind is well demonstrated by a number of the decisions cited therein and others of the same tenor which might have been cited. If respondent is to lose, as the result of the commission of his crime, some right other than his life or liberty, it is for the Legislature, and not the courts to so prescribe.

* * *

ASKREN, J. (dissenting). The majority opinion is a splendid exposition of what exceptions should have been placed in the statute. But the failure to place them there affords us no ground for supplying the deficiency. It may be, as the opinion says, offensive to good conscience to allow a guilty person to obtain the benefits of the statute, but I confess that the shock to my conscience is greater at the attempt of the court to legislate an exception into the statute.

As long as the Constitution provides that the Legislature alone shall enact laws for the people of the state, I shall deny that the court possesses that right.

* * *

MARSHALL v. INDUSTRIAL COMMISSION

342 Ill. 400, 174 N. E. 534 (1930)

ORR, J. The petitioner, by leave of this court, has brought here for review the record of the circuit court of Cook county confirming an award of the Industrial Commission against him in favor of Mary Allesch as the dependent mother of Frank Allesch, deceased.

By stipulation of the parties the only controverted questions before the court are: First, is the mother of an illegitimate child a parent within the provisions of the Workmen's Compensation Act? * * *

Mary Allesch, while a single woman, gave birth to an illegitimate son, who went through life under the name of Frank Allesch, he assuming the name of the man his mother married, although he was not adopted by, nor was he the son of, Allesch. The rights, if any, of Mary Allesch under the Compensation Act rest upon subsection (c) of section seven. Cahill's Rev. St. 1929, c. 48, par. 207 (c). The subsection, in part, is as follows: "* * * the employee leaves any parent or parents, child or children, grandparent, grandchild or grandchildren, who at the time of injury were dependent upon the earnings of the employee, then [a certain sum] not less in any event than one thousand six hundred fifty dollars and not more in any event than three thousand seven hundred fifty dollars [goes to the dependent]."

The word "parent" is defined in Webster's New International Dictionary as, "One who begets, or brings forth, offspring," and this is its ordinary meaning. Nowhere in the Workmen's Compensation Act is it indicated that the word "parent" has a meaning different from that when it is used in its ordinary sense. While by common acceptance the word "parent" without limiting, defining, or qualifying language, is ordinarily used to designate a legitimate relationship between a mother or father and their issue, yet the trend of modern legislation and court decisions has been toward a more liberal use of the term as regards the mother of an illegitimate child. The harsh doctrines of the common law, which gave an unwedded mother and her illegitimate offspring little standing or protection, have been modified by the Legislature and court decisions of this state. Under the common law, an illegitimate had no inheritable blood and was kin to no one. In 1845 the Legislature of this state abrogated the common-law rule, and provided that an illegitimate might inherit from its mother. Subsequent Legislatures further extended the rights of illegitimates until 1872, when the present statute of descent was passed. The natural or unwedded mother is made a legitimate mother, or a "parent," under the statute of descent, and she and her illegitimate issue may inherit one from the other. * * *

By the Injuries Act * * * a mother, as the next of kin, has the benefit of an action by the administrator of the estate of her deceased illegitimate issue for damages for wrongful death, as that act provides for the distribution of suit money to the widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, * * * [An] illegitimate person is recognized as the child of its mother as regards the descent of property. This is true, although nothing is said about an illegitimate or its mother in the Injuries Act, but the statute of descent places a mother and her illegitimate issue on a plane of legitimacy. In construing section 2 of the statute of descent, this

court said in *Morrow v. Morrow*, 289 Ill. 135, 124 N. E. 386, 387, * * * "The tendency of the legislation in this state upon this subject shows an intention upon the part of the Legislature to remove the rigors of the common law and to establish a rule of descent with reference to illegitimates consonant with the finer sense of justice and right, and not to visit the sins of the parents upon the unoffending off-spring."

Plaintiff in error cites the case of *Murrell v. Industrial Comm.*, 291 Ill. 334, 126 N. E. 189, in support of his contention that the mother of an illegitimate child is not a "parent" within the provisions of the Workmen's Compensation Act; but, as a distinguishing feature of the *Murrell Case*, a child was there claiming compensation from its putative father, while in the case at bar the claim for compensation is asserted by its mother. The law, for good and obvious reasons, does not recognize paternal parenthood of illegitimate children. The relationship of the mother and the illegitimate child is certain and easily capable of being determined, and the Legislature by the statute of descent has recognized that an illegitimate child has a mother. That mother is his "parent." There is nothing in the statute that will allow an illegitimate to inherit from the father of such person, but the object of the framers of such act seems to have been to remove the common-law disability of inheritance by illegitimates through the maternal line, and in that regard place such persons upon the same footing as legitimate persons. * * * It is our opinion, therefore, that the mother of an illegitimate child is its "parent" within the provisions of the Workmen's Compensation Act.

* * *

The amount of compensation due the claimant was correctly determined, and the judgment of the circuit court of Cook county is affirmed.

Judgment affirmed.

JUNG v. ST. PAUL FIRE DEPT. RELIEF ASS'N

223 Minn. 402, 27 N. W. (2d) 151 (1947)¹²

MATSON, Justice. Plaintiff, by his mother as guardian ad litem, appeals from a judgment entered for defendant in an action for the recovery of certain pension benefits alleged to be due him upon the death of his illegitimate father.

Plaintiff is a minor child and was born out of wedlock on December 19, 1938, to Dorothy Jung. Prior thereto, on November 1, 1938, Thomas James Kell, in writing and before a com-

¹² The footnotes have been omitted.

petent attesting witness, declared himself to be the father of plaintiff, who was then unborn, as part of a written stipulation for settlement entered into by the mother, the state board of control, and said Thomas J. Kell, whereby the latter agreed to pay and did pay \$1,000 for and in consideration of being relieved from all further liability on account of plaintiff, pursuant to Minn. St. 1945 and M. S. A. § 257.28. This stipulation was approved by the Ramsey county district court.

Thomas J. Kell, who during his life-time was a member of the St. Paul fire department and also an active member in good standing of defendant association, was killed in the line of duty on January 9, 1942. According to the by-laws of defendant, if an active member dies leaving a widow who was his legally married wife or leaves a child or children such widow, and said child or children shall be entitled to a pension out of the association's benefit fund. In the case of a child, such pension would amount to \$11.66 per month and would continue until the age of 16 years is attained. Defendant is organized under and subject to Minn. St. 1945 and M. S. A. § 69.48, which provides:

"When * * * an active member of a relief association, dies, leaving

"(1) A widow * * * ; or

"(2) A child or children * * * [such] widow and the child or children shall be entitled to a pension * * * :"

Subject to certain limitations, which are not here material, such statute further provides that the pension shall be granted "in conformity with the by-laws" of the association.

After plaintiff's application for a pension had been rejected by defendant, the present suit was instituted on his behalf by his mother as guardian ad litem to compel defendant to pay plaintiff the aforesaid monthly pension. The trial court found specifically that plaintiff was not a child of Thomas James Kell within the meaning of the foregoing statute and within the meaning of defendant's by-laws. The only issue we need consider is whether plaintiff, born out of wedlock and whose parentage has been acknowledged by the father in writing and before a competent witness, is a child of the said father within the meaning of that term as used in § 69.48 and in defendant's by-laws.

At common law, a child born out of wedlock is said to be *filius nullius*, the child of nobody, or *filius populi*, the child of the people. The common law is in force in this state except as it has been abrogated by statute or is not adapted to our conditions. * * * Most states, including Minnesota, have enacted statutes mitigating to a greater or less degree the rigors of the common law and have conferred upon illegitimates certain

limited rights. See Minn. St. 1945 and M. S. A. §§ 525.172 and 176.01, subd. 3; * * * In numerous cases, the question has arisen whether illegitimates are included within such terms as "child" or "children" as used in statutes, wills, deeds, and other instruments. By the weight of authority, when the word "child" or "children" is used in a statute it means a legitimate child or children, unless the statutory language reflects an intent to the contrary. A similar interpretation has been adopted with respect to deeds, wills, and similar instruments, unless the context requires, or the circumstances surrounding the execution import, a meaning inclusive of illegitimates.

We come to a consideration of the extent to which the harshness of the common-law rule has been mitigated in this state with respect to the rights and status of children born out of wedlock.

* * *

It is the province of the legislature, not the courts, to modify the rules of the common law. * * * We must therefore turn to an examination of pertinent legislative enactments to determine the degree of modification. One line of authority holds that statutes in derogation of the common law are to be strictly construed; but the more modern view is that when legislation, even though in derogation of the common law, is remedial in character, a liberal construction should be adopted. * * * A statute conferring upon illegitimates rights which the common law denied them is remedial. * * * The remedial nature of such legislation does not, however, justify a construction which gives to the statutory language an application and meaning not intended by the legislature. * * * A legislative modification of the common law is limited in its application and by its necessary implication to the removal of the mischief against which the statute is directed. In determining the extent to which the common law has been abrogated, we are not at liberty, even though the purpose be worthy, to substitute the horizon of judicial imagination for that of legislative intent. * * *

Section 69.48 (quoted above), under which defendant is organized, in its use of the term "child" or "children", obviously does not by and of itself involve or effect any change in the common law so as to include illegitimates. * * * Its reference to defendant's by-laws adds nothing. This court * * * in construing the meaning of the term "child" in G. S. 1923, § 10136, has already determined that such term, without any qualifying language to the contrary, does not embrace illegitimate children. * * * Although the meaning of the term "child" has thus already been determined, plaintiff, nevertheless, contends that the legislature, by reason of having enacted certain statutes extend-

ing to illegitimates certain specific rights denied to them at common law, has in reality determined that the term "child" includes an illegitimate child. The contention seems wholly untenable. Plaintiff first refers to § 525.172, which provides:

"An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation."

Obviously, the foregoing statute pertains to, and confers only, the right of inheritance. It is not in *pari materia* with § 69.48 so as to provide any basis whatever for construing the two statutes with reference to each other. It is also clear that the legislature did not intend thereby to abrogate the common-law rule generally, but only with respect to the right of inheritance, and then in a limited degree. No recognized rule of construction permits this court to invade the province of the legislature by a process of destroying or distorting express statutory provisions intended to limit the application of a statute. Not only must this section be confined to the field of inheritance, but also to a restricted portion of that field. * * *

* * *

We have made nothing more than "some progress" in ameliorating the harsh rule of the common law. * * * The cautious and specific manner in which the legislature granted to illegitimates a limited right of inheritance indicates that it intended thereby to establish, not a repeal of, but only an exception to, the general rule.

Plaintiff also cites § 176.01, subd. 3, whereby it is provided that the term "child" or "children" as used in the Workmen's Compensation Act shall include all children who are entitled by law to inherit from the deceased. Again we have an express exception which only serves to illustrate the restricted manner in which the legislature has accorded rights to children born out of wedlock. If the legislature had intended to make anything more than exceptions to the general rule, it would have used a few simple words to accord to illegitimates all the rights enjoyed by children born of legitimate parents.

With respect to the issues herein discussed, we find it unnecessary to express any opinion as to the effect of the putative father's act in making a cash settlement pursuant to § 257.28, whereby he was relieved of all further liability for the care, maintenance, and education of his illegitimate child.

In a society which has barbarically handicapped and burdened children of illegitimate parents for sins in the commission of

which they had no part, much remains to be done to humanize existing rules of law. As a court, however, we must take legislative enactments as we find them and not invade the legislative field.

The judgment of the lower court must be and is affirmed.
Affirmed.

UNITED MINE WORKERS OF AMERICA v. CORONADO COAL COMPANY

259 U. S. 344, 60 L. ed 975, 42 S. Ct. 570 (1922)¹³

This is a writ of error brought * * * to review a judgment of the Circuit Court of Appeals in the Eighth Circuit. That court on a writ of error had affirmed the judgment of the District Court for the Western District of Arkansas, in favor of the plaintiffs, with some modification, and that judgment thus affirmed is here for review.

The plaintiffs in the District Court were the receivers of the Bache-Denman Coal Company, and eight other corporations in each of which the first-named company owned a controlling amount of stock. * * *

The defendants in the court below were the United Mine Workers of America, and its officers, District 21 of the United Mine Workers of America, and its officers, 27 local unions in District No. 21, and their officers, and 65 individuals, mostly members of one union or another, but including some persons not members, all of whom were charged in the complaint with having entered into a conspiracy to restrain and monopolize interstate commerce, in violation of the first and second sections of the Anti-Trust Act, and with having, in the course of that conspiracy, and for the purpose of consummating it, destroyed the plaintiff's properties. Treble damages for this and an attorney's fee were asked under the seventh section of the act.

* * *

* * * The plaintiffs say that in April, 1914, the defendant and those acting in conjunction with them, in furtherance of the general conspiracy * * * to drive non-union coal out of interstate commerce, and thus to protect union operators from non-union competition, drove and frightened away the plaintiffs' employees including those directly engaged in shipping coal to other States, prevented the plaintiffs from employing other men, destroyed the structures and facilities for mining, loading and shipping coal, and the cars of interstate carriers

¹³ Selected footnotes have been renumbered.

waiting to be loaded, as well as those already loaded with coal in and for interstate shipment, and prevented plaintiffs from engaging in or continuing to engage in interstate commerce. The complaint alleges that the destruction to the property and business amounted to the sum of \$740,000, and asks judgment for three times that amount or \$2,220,000. * * *

* * *

Mr. Chief Justice TAFT. There are five principal questions pressed by the plaintiffs in error here, the defendants below. * * * The second is that the United Mine Workers of America, District No. 21, United Mine Workers of America, and the local unions made defendants, are unincorporated associations and not subject to suit and therefore should have been dismissed from the case on motions seasonably made. * * *

* * *

Second. Were the unincorporated associations, the International Union, District No. 21, and the local unions suable in their names? * * *

* * *

Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. * * * But the growth and necessity of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured produce in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many States authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. We insert in the margin an extended reference,¹⁴ furnished by the industry of counsel, to legislation of this kind. * * *

¹⁴ [Ed.] See the original report for a list of the state statutes on the following subjects:

- (1) Legalization of labor unions and labor combinations.
- (2) Exemption from anti-trust laws by statute.
- (3) Right given to labor unions to sue to enjoin infringement of registered union label or trademark.
- (4) Unauthorized use of registered union label or trademark made an offense.

In the case of *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, an English statute provided for the registration of trades unions, authorized them to hold property through trustees, to have agents, and provided for a winding up and a rendering of accounts. A union was sued for damages growing out of a strike. Mr. Justice Farwell, meeting the objection that the union was not a corporation and could not be sued as an artificial person, * * * gave judgment against the union. This was affirmed by the House of Lords. The legislation in question in that case did not create trade unions but simply recognized their existence and regulated them in certain ways, but neither conferred on them general power to sue, nor imposed liability to be sued * * *

* * * Trade unions have been recognized as lawful by the Clayton Act; they have been tendered formal incorporation as National Unions by the Act of Congress, approved June 29, 1886, c. 567, 24 Stat. 86. In the Act of Congress, approved August 23, 1912, c. 351, 37 Stat. 415, a commission on industrial relations was created providing that three of the commissioners should represent organized labor. The Transportation Act of 1920, c. 91, §§ 302-307, 41 Stat. 469, recognizes labor unions in creation of railroad boards of adjustment, and provides for action by the Railroad Labor Board upon their application. The Act of Congress, approved August 5, 1909, c. 6, § 38, 36 Stat. 112, and the Act approved October 3, 1913, c. 16, subd. G(a), 38 Stat. 172, expressly exempt labor unions from excise taxes. Periodical publications issued by or under the auspices of trade unions are admitted into the mails as second-class mail matter. Act of 1912, c. 389, 37 Stat. 550. The legality of labor unions of postal employees is expressly recognized by Act of Congress, approved August 24, 1912, c. 389, § 6, 37 Stat. 539, 555. By Act of Congress, passed August 1, 1914, no money was to be used from funds therein appropriated to prosecute unions under the Anti-Trust Act (c. 223, 38 Stat. 609, 652).

In this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. * * *

-
- (5) Unauthorized use of union card, badge, or insignia made an offense.
 - (6) Right to participate in selection of membership of boards of arbitration in labor controversies.
 - (7) Right to have member of union on board of arbitrators.
 - (8) Embezzlement of funds of labor union made a special offense.
 - (9) Bribery of union representative made an offense.
 - (10) All public printing to bear union label.

For these reasons, we conclude that the International Union, the District No. 21 and the twenty-seven Local Unions were properly made parties dependent here and properly served by process on their principal officers.

* * *

The judgment is reversed, [on other grounds] and the case remanded to the District Court for further proceedings in conformity to this opinion.

**KEIFER & KEIFER v. RECONSTRUCTION FINANCE
CORP. & REGIONAL AGRICULTURAL CREDIT CORP.**

306 U. S. 381, 83 L. ed. 784, 59 S. Ct. 516 (1939) ¹⁵

Mr. Justice FRANKFURTER. * * * The question is whether a Regional Agricultural Credit Corporation, in the circumstances presently to be stated, is immune from suit.

On July 21, 1932, Congress enlarged the powers of the Reconstruction Finance Corporation (hereafter called "Reconstruction") established early that year, * * *, by authorizing it, among other things, to create regional agricultural credit corporations "in any of the twelve Federal land-bank districts." . . . Each corporation was to have a paid-up capital of not less than \$3,000,000 to be subscribed for by Reconstruction, was to be managed by appointees of Reconstruction, and was empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock. Accordingly, on September 10, 1932, Reconstruction chartered the Regional Agricultural Credit Corporation of Sioux City, Iowa (hereafter called "Regional"). Regional, in due exercise of its powers, entered into so-called cattle-feeding contracts, whereby it undertook to provide sufficient feed and water for livestock with appropriate security for rendering these services. Failure through negligence to provide proper care for cattle delivered under this arrangement, with resulting damage to the livestock, is the basis of this suit brought by petitioner, plaintiff below, against Reconstruction and Regional. Both defendants demurred on several grounds, of which challenge to the jurisdiction of the court is alone pertinent here. The District Court sustained the demurrers and dismissed the suit. . . . The Circuit Court of Appeals affirmed, holding for Reconstruction because its control of Regional had been transferred by Executive Order . . . to the Farm Credit Administration prior to the alleged cause of action, and for Regional because it was found immune from suit . . . Certiorari was granted, directed solely to the latter issue.

¹⁵ The footnotes have been omitted.

The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication. *Principality of Monaco v. Mississippi*, 292 U. S. 313, 321, 78 L. ed. 1282, 54 S. Ct. 745. . . . But because the doctrine gives the government a privileged position, it has been appropriately confined.

Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States v. Lee*, 106 U. S. 196, 213, 221, 27 L. ed. 171, 1 S. Ct. 241. . . . For more than a hundred years corporations have been used as agencies for doing work of the government. Congress may create them "as appropriate means of executing the powers of government, as, for instance, * * * a railroad corporation for the purpose of promoting commerce among the states." *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, 38 L. ed. 808, 14 S. Ct. 891. . . . But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law, such as "*warrantizo*" or "*to A and his heirs*," for which there were no substitutes and without which desired legal consequences could not be wrought. *Littleton, Tenures* (Wambaugh ed.) §§ 1, 733.

Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? . . . This is our present problem. Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions,

and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope. It is noteworthy that the oldest surviving government corporation—the Smithsonian Institution—has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day. . . .

Only two instances have been brought to the Court's attention in which Congress has not explicitly rendered its recent corporate creations amenable to suit. These are the Regionals and the Federal Savings and Loan Associations, 48 Stat. 128, 132-134. It is significant that neither of these classes of corporations was the direct emanation of Congress or the offspring of a general incorporation law under Congressional authority. . . . Each was to come into being through an organ that had theretofore been created by Congress. But the circumstances attending the origination of Regional make it manifest that it was within the considerations that have uniformly led Congress to make its immediate corporate creatures subject to suit. The genesis, functions, and affiliations of Regional all negative the assumption that in its operations it was to be without the law.

Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general corporate powers including authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." 47 Stat. 5, 6, [15 U. S. C. A. § 604.] When later Congress authorized Reconstruction to create these Regional Agricultural Credit Corporations, it did so by outlining in a single section of a comprehensive statute the broad scope of this added power for Reconstruction. 47 Stat. 709, 713. Congress naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being. Such, certainly, has been the practical construction of the Regional Agricultural Credit Corporations in the instinctive pursuit of their enterprise. See, e.g., *Hallenbeck v. Regional Agricultural Credit Corporation*, 47 Ariz. 477, 56 P. (2d) 1041; *Regional Agricultural Credit Corporation v. Elston, Prince & McDade*, La. App., 183 So. 91. . . . To imply for Regionals a unique legal position compared with those corporations to whose purposes Regional is so closely allied, is to infer Congressional idiosyncrasy. There is much more sensible explanation for the failure of Congress

to bring Regional by express terms within its emphatic practice not to confer sovereign immunity upon these government corporations. Congress had a right to assume that the characteristic energies for corporate enterprise with which a few months previously it had endowed Reconstruction would now radiate through Reconstruction to Regional.

To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.

The legal position of Regional is, therefore, the same as though Congress had expressly empowered it "to sue and be sued." . . .

* * *

. . . We should be denying the recent trend of Congressional policy to relieve Regional from liability. This compels us to reverse the judgment of the court below.

Reversed.

UNITED STATES v. HUTCHESON

312 U. S. 219, 85 L. ed. 788, 61 S. Ct. 463 (1940)¹⁶

Mr. Justice FRANKFURTER. Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law, Act of July 2, 1890, 20 Stat. 909, as amended, 15 U. S. C. § 1, is the question. It is sharply presented in this case because it arises in a criminal prosecution. . . .

Summarizing the long indictment, these are the facts. Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. . . . Anheuser-Busch obtained the materials for its brewing and other operations and sold its finished products largely through interstate shipments. . . . Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations

¹⁶ The footnotes have been omitted.

whereby the Machinists were given the disputed jobs and the Carpenters agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch . . . and a request through circular letters and the official publication of the Carpenters that union members and their friends refrain from buying Anheuser-Busch beer.

These activities on behalf of the Carpenters formed the charge of the indictment as a criminal combination and conspiracy in violation of the Sherman Law. Demurrers denying that what was charged constituted a violation of the laws of the United States were sustained, . . . and the case came here under the Criminal Appeals Act. . . .

* * *

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. . . . Section 20 of that Act, . . . withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved all such practices of illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of § 20 to trade union activities directed against an employer by his own employees. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172. Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act. * * *

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were, then, the acts charged against the defendants prohibited or permitted, by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States". * * * There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. * * *

* * *

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it * * * and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by § 20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize

* * * any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act * * * we need not determine whether the conduct is legal within the restrictions which *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172, gave to the immunities of § 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. * * * This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. * * * Such a dispute, § 13(c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." And under § 13(b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor *Anheuser-Busch* could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer &*

Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391, 83 L. ed. 784, 59 S. Ct. 516, * * *

* * * The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. * * * The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press v. Deering*, *supra*, and *Bedford Cut Stone Company v. Journeymen Stone Cutters' Ass'n.*, 274 U. S. 37, 71 L. ed. 916, 47 S. Ct. 522, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

* * *

Affirmed.

* * *

Mr. Justice ROBERTS, dissenting.

* * *

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.

* * *

GANTT v. COLUMBIA COCA-COLA BOTTLING CO.

Supreme Court of South Carolina (1940)
193 S. C. 51, 7 S. E. (2d) 641

L. D. LIDE, Acting Associate Justice. This action relates to a certain bottle of coca-cola, which it is alleged contained poisonous or deleterious matter, to wit, bluestone. On or about April 2, 1933, George Bell Gantt, the respondent herein, a young man, then about eighteen years of age, purchased for immediate con-

sumption a bottle of coca-cola at P. L. Shumpert's country store in Lexington County. According to the custom in such stores he waited on himself, taking the bottle from the ice box and opening it by use of the opener attached thereto. He testified that the bottle appeared to be all right, but that when he had drunk a part of its contents he experienced a burning sensation in his mouth and throat, and felt "fainty like" and became nauseated. He then brought the matter to the attention of V. V. Shumpert, who was in charge of the store. Later he was taken to physicians for treatment, one of whom testified that he "had every appearance of a person that was very sick from some acute cause"; while another said that he "didn't seem to be seriously sick and not sick at all much." At all events, the testimony by and on behalf of plaintiff is to the effect that he was thus made quite ill and that he suffered injurious consequences from such illness.

The bottle with the remainder of the liquid in it was preserved and turned over to a firm of chemists in Columbia for analysis, and as will appear from the testimony of R. M. Simpson, one of these chemists, it was found to contain copper sulphate, or copper and sulphate, which is bluestone, a compound that is not fit for human consumption but is more or less poisonous, and is used by farmers to protect their corn, wheat and oats from rust, and for other like purposes.

This action was commenced on or about September 6, 1934, to recover damages by reason of the incident aforesaid, by George Bell Gantt, by his guardian ad litem, as plaintiff, against Columbia Coca-Cola Bottling Company, as defendant, the same being a corporation with its principal place of business in Columbia, engaged in the business of bottling, distributing and offering for sale the widely advertised and used beverage having the trade name of "Coca-Cola." W. L. Adams was originally also named as defendant and the suit was first commenced in Aiken County, but the venue was afterwards changed to Richland County and W. L. Adams was dropped as a party defendant.

The complaint herein alleges that the defendant company puts up coca-cola in sealed bottles of uniform style, advertising the same to the public as being free of deleterious or harmful ingredients, and as palatable, nutritious, wholesome and invigorating. And it is further alleged that this bottle of coca-cola was bottled by the defendant company and that the same contained bluestone or some similar solution or ingredient that was harmful and poisonous, and that the plaintiff purchased and drank same and was thereby made dangerously ill to his great damage; and that his injuries were due to and caused by the negligence and wilfulness of the defendant company in bottling the coca-cola with bluestone mixed therein; in failing to use proper precaution to prevent such deleterious, harmful and poisonous substance

from getting into the coca-cola; in failing properly to protect such coca-cola from contamination after it was bottled and before it was sold; in failing properly to inspect such coca-cola immediately before putting it on the market; etc.; etc. The defendant answered denying all the material allegations of the complaint.

The cause came on for trial at a term of the Court of Common Pleas for Richland County before Hon. G. Duncan Bellinger, Presiding Judge, and a jury. * * * The jury rendered a verdict in favor of the plaintiff in the sum of \$2,000 actual damages, and the Court refused defendant's motion for a new trial by his order dated May 30, 1939; and the cause comes before this Court upon an appeal from the judgment entered in favor of plaintiff.

* * * [One of the] primary question[s] involved in this appeal is: Did the trial Judge err in refusing to direct a verdict for the defendant, in that: * * * (2) there was no evidence from which the jury could reasonably conclude that the defendant company was negligent?

* * *

Was the evidence of negligence sufficient to take the case to the jury? We have examined the entire record with painstaking care, and we do not hesitate to say that apart from the application of the Pure Food Statute, Section 1452, Code 1932, there is not a vestige of evidence of negligence to be found in the case, and that but for this statute a verdict should have been directed for the defendant company. The plaintiff in making out his case does not even attempt to adduce any evidence, circumstantial or direct, tending to show negligence, apart from the statute. The defendant offered affirmative evidence as to the character of the bottling plant, as above set forth, and also testimony tending to show that the same was operated with all due care and caution; and, as already stated, that bluestone was not used in any way in or about the plant. It was brought out on cross-examination of the manager that the alkaline washing solution used in cleansing the bottles was a caustic preparation, and it was intimated argumentatively that this might have contained, or been related in some way to, bluestone; but the same chemist who analyzed, or assisted in analyzing, the coca-cola involved in this case testified directly without contradiction that there is no relationship between bluestone and caustic solution of soda, and that they are "two different things." We repeat, therefore, that our conclusion is that except for the application of the Pure Food Statute there was no evidence of negligence for the jury.

However, the Court correctly declined to direct a verdict, in that, Section 1452, Code 1932, is applicable to the case at bar, for the reason that the statute makes it unlawful and a criminal

offense for any person to manufacture or sell, or offer for sale, any article of food "if it contain any added poisonous or other added deleterious ingredient, which may render such article injurious to health." And it is further provided in this section that non-alcoholic drinks shall be deemed adulterated if they contain any "compound of copper." Moreover neither knowledge of the contamination nor negligence in fact is a material element of the offense. As we construe the complaint herein it charges a violation of this section. If, therefore, it is found from the preponderance of the evidence that the bottle of coca-cola in question was bottled and sold by the defendant company, and that it contained at the time of the sale and delivery thereof by the company the alleged poisonous or deleterious matter, this would be a violation of the statute, and therefore, negligence per se. It then follows that evidence tending to show a violation of the statute, or negligence per se, would require the submission of the case to the jury, so far as negligence is concerned, although there was no other evidence of negligence, either direct or circumstantial.

But it is earnestly argued by counsel for appellant that the statute has no application here because not pleaded, and also because the statute, if properly construed, does not relieve the plaintiff from the necessity of proving negligence otherwise. It is true that the statute was not pleaded in terms, but the Court is required to take notice of the statutes of the State, whether specifically mentioned or not, if the allegations of fact bring the case within the provisions thereof. Hence we think this complaint may be liberally construed as charging a violation of the terms of the statute. * * *

* * *

With reference to the position of appellant's counsel, which is in effect that a violation of the statute cannot be deemed negligence per se so as to authorize the submission of the case to the jury without other evidence of negligence, we find that this Court has held to the contrary in the various cases in point * * *

* * *

Since our own cases are so uniformly to the effect that violation of the statute is negligence per se, it is unnecessary for us to consider the decisions of other States. We may add, however, that while they are not entirely uniform, it appears that the weight of authority is in accord with our own holding to the effect that the violation of the Pure Food Statute amounts to negligence per se. * * *

Furthermore, the effect of the rule as stated is well explained as follows by the Court of Appeals of Georgia, in the rather recent case of *Southern Grocery Stores v. Donehoo*, 59 Ga. App.

212, 200 S. E. 335, 337: "As to civil actions, the only effect of the pure-food act is that whereas before its passage an action for damages resulting from negligence could be sustained only by allegations and proof of such negligence as a matter of fact, that is, according to the standard of ordinary prudence as applied to the circumstances, the plaintiff may now show negligence as a matter of law by establishing a breach of the statutory duty; or he may rely on both classes of negligence, according to the facts. In other words, the passage of this statute did not affect the nature or basis of the cause of action, but related only to the standard of care by which negligence may be determined. * * * In a civil case of this kind the plaintiff is not required to establish more, on the issue of negligence, than a violation of the statute, and from the terms of the pure-food act * * * it is clearly apparent that it does not include either knowledge of the impurity of the food or negligence in fact as an ingredient of the offense of selling adulterated food, as therein defined."

* * *

(3) The violation of the Pure Food Statute, Section 1452, is negligence per se, and hence sufficient to require the submission of the question of negligence to the jury, even where there is no other evidence of negligence. * * *

* * *

The judgment of the Circuit Court is reversed and the case remanded for a new trial as to actual damages.

BONHAM, C. J., and CARTER, BAKER, and FISHBURNE, JJ., concur.

TEDLA v. ELLMAN

Court of Appeals of New York, 1939
280 N. Y. 124, 19 N. E. 2d 987

LEHMAN, Judge. While walking along a highway, Anna Tedla and her brother, John Bachek, were struck by a passing automobile, operated by the defendant Ellman. She was injured and Bachek was killed. Bachek was a deaf-mute. His occupation was collecting and selling junk. His sister, Mrs. Tedla, was engaged in the same occupation. They often picked up junk at the incinerator of the village of Islip. At the time of the accident they were walking along "Sunrise Highway" and wheeling baby carriages containing junk and wood which they had picked up at the incinerator. It was about six o'clock, or a little earlier, on a Sunday evening in December. Darkness had already set in. Bachek was carrying a lighted lantern, or, at least, there is testimony to that effect. The jury found that the accident was due solely to the negligence of the operator of the automobile. The defendants do not, upon this appeal,

challenge the finding of negligence on the part of the operator. They maintain, however, that Mrs. Tedla and her brother were guilty of contributory negligence as matter of law.

Sunrise Highway, at the place of the accident, consists of two roadways, separated by a grass plot. There are no foot-paths along the highway and the center grass plot was soft. It is not unlawful for a pedestrian, wheeling a baby carriage, to use the roadway under such circumstances, but a pedestrian using the roadway is bound to exercise such care for his safety as a reasonably prudent person would use. The Vehicle and Traffic Law (Consol. Laws, c. 71) [violation of which constitutes a criminal offense] provides that "Pedestrians walking or remaining on the paved portion, or traveled part of a roadway shall be subject to, and comply with, the rules governing vehicles, with respect to meeting and turning out, except that such pedestrians shall keep to the left of the center line thereof, and turn to their left instead of right side thereof, so as to permit all vehicles passing them in either direction to pass on their right. Such pedestrians shall not be subject to the rules governing vehicles as to giving signals." Section 85, subd. 6. Mrs. Tedla and her brother did not observe the statutory rule, and at the time of the accident were proceeding in easterly direction on the east bound or right-hand roadway. The defendants moved to dismiss the complaint on the ground, among others, that violation of the statutory rule constitutes contributory negligence as matter of law. They did not, in the courts below, urge that any negligence in other respect of Mrs. Tedla or her brother bars a recovery. The trial judge left to the jury the question whether failure to observe the statutory rule was a proximate cause of the accident; he left to the jury no question of other fault or negligence on the part of Mrs. Tedla or her brother, and the defendants did not request that any other question be submitted. Upon this appeal, the only question presented is whether, as matter of law, disregard of the statutory rule that pedestrians shall keep to the left of the center line of a highway constitutes contributory negligence which bars any recovery by the plaintiff.

Vehicular traffic can proceed safely and without recurrent traffic tangles only if vehicles observe accepted rules of the road. Such rules, and especially the rule that all vehicles proceeding in one direction must keep to a designated part or side of the road—in this country the right-hand side—have been dictated by necessity and formulated by custom. The general use of automobiles has increased in unprecedented degree the number and speed of vehicles. Control of traffic becomes an increasingly difficult problem. Rules of the road, regulating the rights and duties of those who use highways, have, in consequence, become increasingly important. The Legislature 10

longer leaves to custom the formulation of such rules. Statutes now codify, define, supplement, and, where changing conditions suggest change in rule, even change rules of the road which formerly rested on custom. Custom and common sense have always dictated that vehicles should have the right of way over pedestrians and that pedestrians should walk along the edge of a highway so that they might step aside for passing vehicles with least danger to themselves and least obstruction to vehicular traffic. Otherwise, perhaps, no customary rule of the road was observed by pedestrians with the same uniformity as by vehicles; though, in general, they probably followed, until recently, the same rules as vehicles.

Pedestrians are seldom a source of danger or serious obstruction to vehicles and when horse-drawn vehicles were common they seldom injured pedestrians using a highway with reasonable care, unless the horse became unmanageable or the driver was grossly negligent or guilty of willful wrong. Swift-moving motor vehicles, it was soon recognized, do endanger the safety of pedestrians crossing highways, and it is imperative that there the relative rights and duties of pedestrians and of vehicles should be understood and observed. The Legislature in the first five subdivisions of section 85 of the Vehicle and Traffic Law has provided regulations to govern the conduct of pedestrians and of drivers of vehicles when a pedestrian is crossing a road. Until by chapters 114 of the Laws of 1933, it adopted subdivision 6 of section 85, quoted above, there was no special statutory rule for pedestrians walking along a highway. Then for the first time it reversed, for pedestrians, the rule established for vehicles by immemorial custom, and provided that pedestrians shall keep to the left of the center line of a highway.

The plaintiff showed by the testimony of a State policeman that "there were very few cars going east" at the time of the accident, but that going west there was "very heavy Sunday night traffic." Until the recent adoption of the new statutory rule for pedestrians, ordinary prudence would have dictated that pedestrians should not expose themselves to the danger of walking along the roadway upon which the "very heavy Sunday night traffic" was proceeding when they could walk in comparative safety along a roadway used by very few cars. It is said that now, by force of the statutory rule, pedestrians are guilty of contributory negligence as matter of law when they use the safer roadway, unless that roadway is left of the center of the road. Disregard of the statutory rule of the road and observance of a rule based on immemorial custom, it is said, is negligence which as matter of law is a proximate cause of the accident, though observance of the statutory rule might, under the circumstances of the particular case, expose a pedestrian to serious

danger from which he would be free if he followed the rule that had been established by custom. If that be true, then the Legislature has decreed that pedestrians must observe the general rule of conduct which it has prescribed for their safety even under circumstances where observance would subject them to unusual risk; that pedestrians are to be charged with negligence as matter of law for acting as prudence dictates. It is unreasonable to ascribe to the Legislature an intention that the statute should have so extraordinary a result, and the courts may not give to a statute an effect not intended by the Legislature.

The Legislature, when it enacted the statute, presumably knew that this court and the courts of other jurisdictions had established the general principle that omission by a plaintiff of a safeguard, prescribed by statute, against a recognized danger, constitutes negligence as matter of law which bars recovery for damages caused by incidence of the danger for which the safeguard was prescribed. The principle has been formulated in the Restatement of the Law of Torts: "A plaintiff who has violated a legislative enactment designed to prevent a certain type of dangerous situation is barred from recovery for a harm caused by a violation of the statute if, but only if, the harm was sustained by reason of a situation of that type." § 469. So where a plaintiff failed to place lights upon a vehicle, as required by statute, this court has said: "we think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway. Highway Law [Consol. Laws, c. 25] § 329-a. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this State." *Martin v. Herzog*, 228 N. Y. 164, 168, 126 N. E. 814, 815, per Cardozo, J. The appellants lean heavily upon that and kindred cases and the principle established by them.

The analogy is, however, incomplete. The "established rule" should not be weakened either by subtle distinctions or by extension beyond its letter or spirit into a field where "by the very terms of the hypothesis" it can have no proper application. At times the indefinite and flexible standard of care of the traditional reasonably prudent man may be, in the opinion of the Legislature, an insufficient measure of the care which should be exercised to guard against a recognized danger; at times, the duty, imposed by custom, that no man shall use what is his to the harm of others provides insufficient safeguard for the preservation of the life or limb or property of others. Then the

Legislature may by statute prescribe additional safeguards and may define duty and standard of care in rigid terms; and when the Legislature has spoken, the standard of the care required is no longer what the reasonably prudent man would do under the circumstances but what the Legislature has commanded. That is the rule established by the courts and "by the very terms of the hypothesis" the rule applies where the Legislature has prescribed safeguards "for the benefit of another that he may be preserved in life or limb." In that field debate as to whether the safeguards so prescribed are reasonably necessary is ended by the legislative fiat. Obedience to that fiat cannot add to the danger, even assuming that the prescribed safeguards are not reasonably necessary and where the legislative anticipation of dangers is realized and harm results through heedless or willful omission of the prescribed safeguard, injury flows from wrong and the wrongdoer is properly held responsible for the consequent damages.

The statute upon which the defendants rely is of different character. It does not prescribe additional safeguards which pedestrians must provide for the preservation of the life or limb or property of others, or even of themselves, nor does it impose upon pedestrians a higher standard of care. What the statute does provide is rules of the road to be observed by pedestrians and by vehicles, so that all those who use the road may know how they and others should proceed, at least under usual circumstances. A general rule of conduct—and, specifically, a rule of the road—may accomplish its intended purpose under usual conditions, but, when the unusual occurs, strict observance may defeat the purpose of the rule and produce catastrophic results.

Negligence is failure to exercise the care required by law. Where a statute defines the standard of care and the safeguards required to meet a recognized danger, then, as we have said, no other measure may be applied in determining whether a person has carried out the duty of care imposed by law. Failure to observe the standard imposed by statute is negligence, as matter of law. On the other hand, where a statutory general rule of conduct fixes no definite standard of care which would under all circumstances tend to protect life, limb or property but merely codifies or supplements a common-law rule, which has always been subject to limitations and exceptions; or where the statutory rule of conduct regulates conflicting rights and obligations in manner calculated to promote public convenience and safety, then the statute, in the absence of clear language to the contrary, should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty; nor should it be construed as an inflexible command that the general rule of conduct intended to prevent accidents must be followed even under con-

ditions when observance might cause accidents. We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger.

The distinction in the effect of statutes defining a standard of care or requiring specified safeguards against recognized dangers and the effect of statutes which merely codify, supplement or even change common-law rules or which prescribe a general rule of conduct calculated to prevent accidents but which under unusual conditions may cause accidents, has been pointed out often. Seldom have the courts held that failure to observe a rule of the road, even though embodied in a statute, constitutes negligence as matter of law where observance would subject a person to danger which might be avoided by disregard of the general rule. . . .

The generally accepted rule and the reasons for it are set forth in the comment to section 286 of the Restatement of the Law of Torts: "Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment. * * * The provisions of statutes intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede. Thus, a statute or ordinance requiring all persons to drive on the right side of the road may be construed as subject to an exception permitting travellers to drive upon the other side, if so doing is likely to prevent rather than cause the accidents which it is the purpose of the statute or ordinance to prevent."

* * *

CRANE, C. J., and HUBBS, LOUGHRAN, and RIPPEY, JJ., concur.
O'BRIEN and FINCH, JJ., dissent on the authority of *Martin v. Herzog*, 228 N. Y. 164, 126 N. E. 814.

Judgments affirmed.

Note: For a general discussion of the problems involved in utilizing criminal statutes by analogy in negligence actions, see

Morris, The Role of Criminal Statutes in Negligence Actions, 49 Columbia L. Rev. 21 (1949).

VIRGINIA BREWING CO. v. WEBBER

Supreme Court of Appeals of Virginia, 1936
167 Va. 67, 187 S. E. 447

BROWNING, Justice. The plaintiff in error is a Virginia corporation which issued and offered for sale its capital stock. Before selling any of its stock it was required to, and did, comply with the provisions of chapter 147A of the Code of Virginia 1930 (section 3848 (47) et seq.) as amended, commonly known as the "Blue Sky Law."

During the promotion period of its existence, the Virginia Brewing Company was called the Shenandoah Brewing Company, and in this name it was originally incorporated, but by charter amendment it became the Virginia Brewing Company.

The defendant in error, Webber, was a stock salesman and was licensed by the State Corporation Commission to sell the stock of the plaintiff in error.

The provision of the law fixing the conditions of the stock subscriptions or stock sales were required to be strictly observed by the sales agent, the corporation, and its officers.

The president of the corporation, during its promotion period, was L. A. Scholz, and its secretary and treasurer, who was in charge of stock sales, was E. E. Ernst.

The facts relating to the transaction which is the subject of this suit are substantially and briefly these:

That on April 10, 1934, Mr. Webber, the stock salesman referred to, concluded a contract of sale to one Phieffer of \$5,500, of the stock of the corporation; that the contract was signed by Phieffer and the Shenandoah Brewing Company, Inc., by E. W. Webber, authorized and licensed representative. It was a printed contract, prescribed by section 3848 (51), cl. (m), as amended by Acts 1934, c. 341, and approved by the State Corporation Commission; that upon the execution of the contract the subscriber made no cash payment on his stock purchase, but deposited with Scholz 200 shares of Standard Brands, Inc., stock, represented by two certificates. The contract bore at its top the following notation: "Hold 30 days sale of stock." The two certificates of stock were worth at the time of the execution of the contract the sum of \$4,200, but on November 8, 1934, by direction of Mr. Ernst, the secretary and treasurer of the corporation, the stock was by entry of the bookkeeper taken into the corporation as an asset at the sum of \$3,600; that being its market value as of that date. Subsequently this credit

entry was cancelled on the books of the corporation by the successor in office to Mr. Ernst.

The facts further are that Scholz, while still president of the corporation, returned the two stock certificates to Phieffer, upon the advice of the attorney for the corporation; that before the stock was returned to him, Phieffer had been noted present at a stockholders' meeting and voted the full amount of his subscription; that on January 5, 1935, Phieffer made a payment of \$600, on the contract, and on February 7, 1935, Mr. Ernst, acting as vice president of the corporation, addressed a letter to Webber, the stock salesman, advancing the sum of \$25.00, "against commission due you on the Phieffer sale, wish to advise you that this matter was taken up with the president and secretary of the corporation, and your request was granted"; that Webber was paid the sum of \$72, on account of commissions on the \$600 payment made by Phieffer, which did not include the \$25 advancement referred to, which was subsequently paid back to the corporation; that the corporation was never paid anything on the purchase price of the stock except the \$600 referred to.

Webber instituted suit against the corporation by notice of motion for judgment for damages in the sum of \$558, with interest, which represented the amount of his commissions on the stock subscription sale under the contract, less the sum of \$97, which he had already received. There was a verdict in this suit by the jury for the full amount claimed by the plaintiff, which was sustained by the trial court.

It is also in evidence that the corporation made repeated demands on Phieffer for the amount of his subscription, and that it brought suit against him on account thereof in June, 1935, which was pending at the time of the termination of the suit in judgment.

The contention of the plaintiff in error in the suit in judgment is that the defendant in error is not entitled to recover because the terms of the Blue Sky Law, contained in sections 3848 (66), inclusive, of the Code of Virginia of 1930, as amended, had not been complied with, in that the stock of the corporation purchased by Phieffer had not been paid for in actual money or at all; that the contract, made under the provisions of the statute and approved by the State Corporation Commission, and assented to by the defendant in error by his becoming a party thereto, as required by the statute, expressly exacted such payment by its terms.

The plaintiff in error, defendant in the court below, made its defense by a motion to strike out the plaintiff's evidence and by offering an appropriate instruction. This motion was overruled and the instruction was refused.

The single issue, in our judgment, to be determined is whether or not the terms and provisions of the Blue Sky Law are to be adhered to and its integrity kept unimpaired.

Black's Law Dictionary, p. 229, defines the term "Blue Sky Law" as follows:

"A popular name for acts providing for the regulation and supervision of investment companies, for the protection of the community from investing in fraudulent companies. A law intended to stop the sale of stock in fly by night concerns * * * and other like fraudulent exploitations." Brock v. Hines, 97 Okla. 147, 223 P. 654, 656; Dinsmore v. National Hardwood Co., 234 Mich. 436, 208 N. W. 701.

The contract which is involved here contains this provision:

"That the commission which the company has agreed to pay for the sale of its stock will be paid only as payments on account of subscriptions to such stock are unconditionally and irrevocably made in actual money; and the representative who takes this subscription expressly assents to this provision as to payment of commission."

Section 3848 (51), cl. (m), is, in part, as follows:

"It shall be unlawful for any person or corporation to engage in selling, offering to sell or contracting to sell any security such as designated in section three of this act, * * * except by printed contract, the form of which shall be approved by the commission, * * * and it shall be unlawful for any corporate officer or other person in any capacity whatsoever to pay or issue or cause to be issued or paid for any such consideration, or as a bonus any money, stock or securities except as set forth in such subscription contract."

Subsection 61 of the act (Code 1930, § 3848(61)) provides that any person, as principal or otherwise, who shall commit in whole or in part any act declared unlawful by this act, shall be deemed guilty of a misdemeanor and on conviction be punished by fine or imprisonment or both.

Subsection 66 of the act (Code 1930, § 3848(66)) provides that it shall be remedial and shall be liberally construed to effect its manifest objects and purposes. Troth v. Robertson, 78 Va. 46; Gobble v. Clinch Valley Lumber Co., 141 Va. 303, 127 S. E. 175; Richardson v. Commission, 131 Va. 802, 109 S. E. 460.

The object and purpose of the act was to suppress an existing and growing evil in this state. The investment market was flooded with stocks of little or no value and promoters and stock salesmen, well versed in trade talk, preyed upon an unwary public by inducing it to purchase this character of stock.

The statute which was originally passed by the Legislature of 1916 (Acts 1916, c. 499), was strengthened in its strictness

from time to time by amendment to its present form as quoted in part.

The manifest purpose and design was to correct the evil referred to and one of the means to accomplish this end was to forbid the payment of commissions on "trade-in sales and uncollectible subscriptions."

This was the genesis of the contract and the statutory requirements relating thereto.

To allow a recovery in a suit for damages or otherwise based on a contract which is contrary to the spirit, purpose, and intentment of the statute would contravene the public policy of the state which is expressed by its statute.

"That which is plainly within the spirit, meaning, and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." *Hasson v. Chester*, 67 W. Va. 278, 67 S. E. 731.

The above expressions reflect our judgment in the matter, and it is therefore unnecessary to discuss the evidence or to note further the contentions of the defendant in error. We reverse the judgment of the trial court.

Reversed.

JOHN E. ROSASCO CREAMERIES v. COHEN

Court of Appeals of New York, 1937
276 N. Y. 274, 11 N. E. 2d 908

FINCH, Judge.—The plaintiff, a milk dealer, brought this action to recover approximately \$11,000 as the agreed and reasonable value of milk sold and delivered to the defendants, who are also milk dealers. The answer admits the sale and delivery of milk, the quantity thereof, and the failure to pay, but denies the allegations concerning the agreed and reasonable value of the milk. As an affirmative defense, it alleges that the plaintiff was not licensed as a milk dealer in accordance with the Agriculture and Markets Law (Consol. Laws, c. 69) during the period when it sold the milk to the defendants. The lack of license is admitted in the reply of the plaintiff. The defendants assert two counterclaims. The first is for damages for an alleged breach of an oral contract, which, it is asserted, provided that the plaintiff would sell and deliver, and defendants would purchase, all milk required by the defendants in connection with their business up to a total of 10,500 forty-quart cans per month. By the second counterclaim, the defendants seek to recover a sum of money alleged to have been overpaid to the plaintiff. The reply of the plaintiff denies allegations of the counterclaims, and pleads in bar the claim urged by the defendants of the illegality of the

transaction. It also relies on the statute of frauds as a defense to the first counterclaim.

At Special Term a motion to strike out the affirmative defense was granted, and a motion by the defendants to dismiss the complaint was denied. Subsequently Special Term granted summary judgment in favor of the plaintiff and dismissed the counterclaims. Appeals were taken, and both appeals were decided at the same time. The Appellate Division, one justice dissenting, reversed the order striking out the first affirmative defense, and dismissed the complaint on that ground. The Appellate Division also reversed the summary judgment, stating in its opinion that the dismissal of the complaint required this in so far as the summary judgment granted affirmative relief to the plaintiff, and that the affidavits presented issues of fact in so far as they applied to the counterclaims.

The primary issue for decision is whether a dealer in milk, which makes sales while unlicensed, may recover the agreed price or the reasonable value of milk sold to another dealer. The contention that the failure to obtain a license renders the claim unenforceable is based on section 257 of the Agriculture and Markets Law, which reads as follows:

"§ 257. Licenses to milk dealers. No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less."

Illegal contracts are generally unenforceable. Where contracts which violate statutory provisions are merely *malum prohibitum*, the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, vol. 3, § 1789; vol. 5 (ad. Ed.) § 1630. Cf. American Law Institute, Restatement of the Law of Contracts, §§ 548, 600.

In *Sajor v. Ampol, Inc.*, 275 N. Y. 125, 9 N. E. 2d 803, the lower courts held that the plaintiff could rescind his subscription to the defendant's stock on the ground that the failure to comply

with the statutory requirement which prohibited the sale of securities to the public without first filing a notice with the Department of State, rendered the sale null and void. In reversing, this court, in an opinion by Chief Judge Crane, said: "The notice, requiring the name of the dealer, his business or post office address, the State of incorporation and other like matters, in no way affected the plaintiff's purchase. Such a statement had no relation whatever to his transaction. Its purpose was to inform the Attorney-General and the State authorities of the stock business carried on by dealers and of the place where such business was to be conducted. * * * The statute does not make sales void or voidable or unenforceable when such notice has not been filed. Such is the requirement of many of the States of the Union which have similar statutes. Our statute has an omnibus provision relating to the violation of any provision of article 23-A of the General Business Law, making the violation a misdemeanor punishable by a fine of not more than \$500, or imprisonment of not more than one year, or both (§ 359g, subd. 2). This penalty provided for the violation is the exaction which the law makes, and no other. We should not read into the provisions of the statute that which other State legislators have found necessary to insert, in order to reach the transactions between the parties. Our Legislature * * * did not intend to make void or voidable any and every contract made with a corporation dealer, otherwise valid, simply because it had failed to comply with the many administrative provisions of this law. * * *

Of like tenor is *Fosdick v. Investors' Syndicate, Inc.*, 266 N. Y. 130, 194 N. E. 58, where the defendant had failed to comply with the Banking Law (Consol. Laws, c. 2), which prohibits a foreign corporation from doing the business of an investing company in this state without first obtaining a license. We held that, despite this failure to obtain a license, a purchaser from the defendant could not recover back installment payments made on account of the purchase.

The reasoning of both these cases is applicable to the case at bar. The statute involved does not expressly provide that contracts made by unlicensed milk dealers shall be unenforceable, although it does make a violation of the so-called milk control law a misdemeanor punishable by a fine of not less than \$25 nor more than \$200 or by imprisonment for not less than one month nor more than six months, or both. In the case at bar, if the contract is declared unenforceable, the effect will be to punish the plaintiff to the extent of a loss of approximately \$11,000 and permit the defendants to evade the payment of a legitimate debt. Nor was the statute enacted for the purpose of protecting dealers such as the defendants. The primary purpose of the statute is to protect producers and the consuming public. Little

danger to the public health is involved by the sale of milk by unlicensed dealers, the statute itself providing that dealers who have less than 3,000 pounds of milk a month and those selling milk in any quantity in markets of 1,000 population or less, may be exempted from its requirements. * * *

We have here a statute which provides that milk dealers shall not sell milk unless duly licensed. The statute imposes penalties for its violation by way of fine and imprisonment, but it does not expressly provide that contracts made by milk dealers shall be unenforceable. Nothing in this statute reveals an implied intent to deprive unlicensed dealers of the right to recover the reasonable value of the milk sold by them, and where the wrong committed by the violation of the statute is merely *malum prohibitum*, and does not endanger health or morals, such additional punishment should not be imposed unless the legislative intent is expressed or appears by clear implication.

The judgment of the Appellate Division dismissing the complaint should be reversed, and the order of the Special Term striking out the separate defense affirmed, and the matter remanded, with costs to abide the event.

CRANE, C. J., and LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, and RIPPEY, JJ., concur.

Judgment accordingly.

F. LEGISLATIVE ANALOGY IN LEGISLATIVE ADVOCACY

Examples

In addition to its use as a weapon in the judicial arena, legislative analogy plays a significant role in the furtherance of new legislation.¹⁷ For example:

Prior to the nineteenth century, gambling was prohibited in most of the colonies. From specific prohibitions, statutes expanded by analogy to cover most of the games of chance played with cards or dice. Modern mechanical gambling machines presented a new problem but not a new policy. Regulation kept pace with invention. And when public fancy turned to horse racing, yacht racing, and animal fighting, baseball and football pools, there was an equal readiness to condemn such conduct. Although it hardly can be recommended as desirable legislative draftsmanship, case by case statutory expansion has paralleled the judicial technique of deciding questions as they arise. And even the amendatory process by which this has been done would be unnecessary in many cases if courts themselves would apply the statutes by analogy in similar cases.¹⁸

¹⁷ See the development of this thesis in Horack, *The Common Law of Legislation*, 23 Iowa L. Rev. 41 (1937).

¹⁸ *Ibid.*, 46-47.

An instance of the use of legislative analogy in legislative advocacy is the attempt, prior to 1906, to extend federal controls to *all* food products shipped in interstate and foreign commerce. The strategy was to single out one food item—flour—which already was regulated, show the benefits of the regulation, and then argue (by analogy) that if these benefits flow from the federal regulation of flour, similar benefits should also flow if other products were regulated by the federal government. Here is the argument as it was spelled out in detail:¹⁹

I want to say to the President of the Senate and to Senators that since the Committee on Manufactures undertook the investigation of [the adulteration of food products] about three years ago, they have taken a large volume of evidence and have reported several bills, one of which only has been passed. This investigation has awakened such an interest in the matter of pure food within this country that now every State of the United States has passed some law in regard to the regulation of food manufactures.

We found at the beginning of the investigation the most common and widespread system of adulteration of the foods the American people are using. As to flour alone, which was and is regarded as the staff of life, the committee discovered that 60 per cent of the flour that was sold in the United States was adulterated. The adulteration consisted, first, in ground white corn; second, in what is known as corn flour, which is a by-product of the glucose factory after the sugar and the gluten have been taken from the corn, leaving nothing but the husk. As high as 25 or 30 per cent of this was used in mixing with the flours of the United States, and more than half of all the mills in the United States had what is commonly known as a mixer. The most dangerous and deleterious substance which was mixed with American flour was an article sold as mineraline, and which we traced to two or three large factories in North Carolina—I think two. I wish to say, by the way, however, that the Senator from that State was very helpful in the passage of this pure-food legislation. Those mills were engaged in the grinding of white earth, which was sold as mineraline and mixed with American flour.

The Senate amended the bill known as the Dingley bill at the request of the Committee on Manufactures and regulated that food product by placing a tax, according to my recollection, of about 4 cents a barrel upon it, so as to give notice to the consumer that it was mixed flour, treating it exactly as we treated the subject of oleomargarine. The result has been that while it has not produced great revenue, perhaps not more than enough revenue to pay for its col-

¹⁹ 35 Cong. Rec. 282-283 (1901). This is from a speech by Senator Mason of Illinois, a vigorous proponent of national food legislation in the days prior to the enactment of the Federal Food and Drug Act of 1906.

lection, yet it is that class of legislation which has been recognized by the Supreme Court of the United States as proper and correct. During the first twelve months after the passage of the law about 12,000 barrels of mixed flour were confiscated containing terra alba. The mills that were used in grinding it have been closed—they are absolutely out of business—and the export trade has increased from 10,000,000 barrels of flour to 15,000,000 in twelve months.

I call this to the attention of those Senators who were kind enough to help in the passage of the pure-food bill. I want to leave this thought with you all. We are looking for broader and greater markets; what we have to sell are food products—our meats and the flour made from our corn, wheat, and rye. I have discovered that the best means of obtaining for the American food products the European market is to have the Government stand back of and guarantee the purity of the goods we ship abroad.

I have here a printed letter from the leading merchants in flour in twelve or fifteen of the largest cities in the world, embracing London, Bremen, Glasgow, Liverpool, Rotterdam, Amsterdam, Antwerp, Bristol, Hamburg, and so on, stating that immediately after the passage of what is known as the American pure-food bill the demand for American flour increased. While I do not claim that that large increase of 50 per cent is due to the fact that we guaranteed the purity of our flour, yet I do believe, and it is generally believed by the manufacturers of flour in this country, that a large share of that increase was due to that cause. Indeed, such evidence appeared before the committee; and if somebody would have been kind enough or thoughtful enough or cared enough about it to read the correspondence of the importers and exporters of American flour, he would find that in all the great food-consuming centers of the world immediately after we passed the law guaranteeing the purity of American flour the demand for American flour increased.

We had this triple advantage: We protected the consumer, we helped the honest miller, who was grinding honest flour, against the common cheat who was deceiving the people, and at the same time we advertised our food products abroad. While we have protected our own consumer we have assisted the honest manufacturer.

Not only as to flour, but as to every other food product we examined, we found this element of adulteration. We found it in the spices that go on the table, the sirups, the jellies, the jams, the pickles, the ten thousand kinds of food, many of them adulterated more by sophistication than by the introduction of actual deleterious substances. I simply suggest to you that I have presented and referred again to the same committee other bills [to extend federal controls to adulterated food products generally].

CHAPTER 7

PROBLEMS RELATING TO INVESTIGATIONS UNDER LEGISLATIVE AUTHORITY

A. INTRODUCTORY NOTE

The power of investigation, especially as exercised by Congressional committees, has taken on increased importance in recent years. Not only has the power been used for the purposes of law-making, for turning a powerful searchlight on government, for supervising the executive, for molding public opinion, for judging or disciplining members of legislative bodies—it has also been used for making political capital, for embarrassing opponents, for exposure of private individuals and groups, for publicity.¹ The power has been used, it has also been abused; it has been productive of a great deal of both good and harm.² Often the lawyer is called upon to play a significant role in the proceedings—not only as prosecutor but, even more important, as witness and defender. Contrasted with the judicial arena, in which he is used to operating with comparative ease and comfort, he will often find himself ill at ease in the surroundings of the legislative committee. For although the committee may be armed with weapons as powerful as those used by the courts, it does not use them quite in the same way, nor—as has often been the case—with the same restraint. Judicial rules of procedure are fairly well formalized and deeply rooted in the traditional safeguards of due process of law. The rules of committee procedure are not so well formalized or rooted. They are more of the *ad hoc* variety, varying with the purpose for which the committee was created, and, often, with the mood of the committee members. The closest approximation to the “judicial” is in the Senate’s power “to try all impeachments”,³ in the power of each house to be “the judge of the elections, returns and qualifications of its own members,”⁴ and

¹ Note the remark of Congressman Dies on the floor of the House after the creation of the House Committee on Un-American Activities “I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession.” 81 Cong. Rec. 7570 (1938).

² Valuable discussions of the workings of Congressional committees may be found in Eberling, *Congressional Investigations* (1929); Dimock, “Congressional Investigating Committees,” 47 *John Hopkins University Studies* (1928); McGeary, *The Development of Congressional Investigating Powers* (1940); Ogden, *The Dies Committee* (1945).

³ Const. Art. 1, Sec. 3(6).

⁴ Const. Art. 1, sec. 5(1).

to punish and expel any of its members.⁵ Here, the procedure is more apt to be patterned, by way of analogy, along judicial lines.⁶ Not so, however, investigations in aid of future legislation, or for checking how laws are being administered, or for exposure and publicity. Here, it is explained, the purpose is merely to ascertain "the facts," and not to "try" anyone; and it is, therefore, unnecessary and even cumbersome to indulge in the procedural niceties which one expects in a judicial proceeding.⁷ Accordingly, in these investigations, such safeguards as cross-examination of witnesses, the introduction of evidence, etc. are often lacking; and, if the situation warrants it, Congressional committees of inquiry may even be permitted to keep the hearings, records and reports secret. Even in the matter of permitting witnesses to be advised by counsel, there have been instances in which "the witnesses were allowed to leave the room [only] in the discretion of the committee and ask the advice of counsel awaiting them";⁸ and, occasionally, there have been situations in which witnesses have been denied permission to consult counsel who attended them.⁹

Although such investigations are not "trials" in the technical legal sense, i.e. before judge and jury, there may be instances in which they are, in a very real and practical sense, "trials" before the bar of public opinion. For example, in a recent investigation of the House Committee on Un-American Activities,¹⁰ the mere assertion by a witness of a fugitive rumor that one was a "Communist" or "Communist sympathizer" might be sufficient—what with the power of the press—to cause the loss of personal and economic security; and to deny such person the opportunity to cross-examine the accusing witness or otherwise disprove the allegations made before the Committee may, to some, be as serious in its practical consequences as a conviction for a crime. One of the witnesses, haled before this Committee, complained that the denial of procedural safeguards deprived him of "the opportunity that any pickpocket receives in a magistrate's court—the right to cross-examine these witnesses, to refute their testimony, to reveal their motives, their history, and who, exactly, they are."¹¹

Criticism of Congressional procedures which permit such "convictions" without the rudiments of a fair "trial" was recently made by Mr. Eric Johnston, president of the Motion Pic-

⁵ Const. Art. 1, Sec. 5(2).

⁶ Wigmore on Evidence, 3rd ed. (1940), vol. 1, Secs. 4j, 4k.

⁷ This is the view of Dimock, in his "Congressional Investigating Committees," 47 Johns Hopkins University Studies 153 (1929).

⁸ *Ibid.*, 150

⁹ *Ibid.*

¹⁰ Hearings before the Committee on Un-American Activities, H. R. 80th Cong., 1st Sess., 1947.

¹¹ *Ibid.*, 367.

ture Association of America, in a public letter to leaders of Congress, protesting the procedure adopted by the Committee on Un-American Activities in investigating the motion picture industry. "Too often," writes Mr. Johnston, "individuals and institutions have been condemned without a hearing or a chance to speak in self-defense; slandered and libeled by hostile witnesses not subject to cross-examination and immune from subsequent suit or prosecution. Legal counsel cannot be heard except at the committee's pleasure. * * * The committee can accept or reject explanatory statements for the record. * * * I am thoroughly aware that a Congressional investigation is a fact-finding inquiry and not a trial; that a committee is neither a prosecutor nor a court; that it neither indicts nor convicts. But in practice, the committee becomes prosecutor, judge, and jury, and the individual becomes the defendant. With no vested right to be heard and no vested right to challenge accusations against him, the innocent citizen is helpless. He can be indicted and convicted in the public mind on the unchallenged say-so of a witness who may be completely sincere, but can be either misinformed or riddled with prejudice. Without fear of reprisal, a prejudiced witness can exercise venom as well as veracity."¹²

Of course, not all investigations have been as fever-pitched as those dealing with Un-American activities or have received such public prominence as the recent Howard Hughes inquiry. These, it would seem, are the exception rather than the rule. Both Eberling¹³ and McGeary,¹⁴ who have made comprehensive studies of Congressional investigating committees, are of the view—shared by many others—that, on the whole, Congress has not abused its powers of investigation, and that the inquisitorial powers of Congress have been a salutary force in the interests of good government. But it is precisely the dramatic situations in the exceptional cases which crystallize the issues and help carve out for the lawyer the yet uncertain lines between legislative investigatorial power and personal rights. The materials which follow are intended to etch the broad outlines of this area, and point up some of the problems of the lawyer within it.¹⁵

¹² N. Y. Times, October 25, 1947, 17.

¹³ Congressional Investigation (1928), 297.

¹⁴ The Development of Congressional Investigative Powers (1940), 81.

¹⁵ Helpful studies on the subject are: Loring, Powers of Congressional Investigating Committees, 8 Minn. L. Rev. 595 (1924); Note, 38 Harv. L. Rev. 234 (1924); Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694 (1926); Landis, Constitutional Limitation on Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 780 (1926); Galloway, The Investigative Function of Congress, 21 Am. Pol. Sci. Rev. 47 (1927); Stebbins, Limitations of the Powers of

B. PROBLEMS

"Pertinency" as a Limitation; The Right Against Self-Incrimination

Problem A:

Excerpts from the Congressional hearings in "the Hughes Investigation"

By resolution, the Senate in 1947 empowered a special committee to investigate "The National Defense Program," with the reservation that the subject matter to be studied and investigated be limited "** * * to excessive profits, fraud, corruption, waste, extravagance, mismanagement, incompetence, and inefficiency in expenditures connected with the prosecution of the national defense.*"¹⁶ (Emphasis supplied.)

One of the subjects chosen and investigated by the Committee were alleged machinations of the Hughes Aircraft Company and Kaiser-Hughes Corporation in procuring aircraft contracts from the government. The following excerpts are from the Committee hearings: ¹⁷

Senator Cain. * * *

Yesterday I asked you, Mr. Meyer, or you told me * * * that you were first deferred from the draft in 1941, because you had dependents.

Mr. Meyer. That is correct.

Mr. Slack. [Counsel, Hughes Tool Co.] As I understand it, the purpose of this investigation is to go into the airplane contracts of the Kaiser-Hughes and the Hughes Tool Co.

Senator Cain. Right.

Mr. Slack. I have understood that the Department of Justice has been considered quite competent to investigate the draft status of private citizens.

Senator Cain. Yes.

Congressional Investigating Committees, 16 A. B. A. J. 425 (1930); Gallo-way, Investigations, Governmental, 8 Encyc. Soc. Sci. 251 (1932); Herwitz and Mulligan, The Legislative Committee, 33 Col. L. Rev. 1 (1933); Gose, The Limits of Congressional Investigating Power, 10 Wash. L. Rev. 61 (1935); Lathan, Power of Investigation in the Commonwealth, 9 Aust. L. Rev. 213, 247 (1935); Hamilton, The Inquisitorial Power of Congress, 23 A. B. A. J. 511 (1937); Cousins, The Purpose and Scope of Investigations Under Legislative Authority, 26 Geo. L. J. 905 (1938); Note, 42 Col. L. Rev. 1217 (1942); Comment, 47 Col. L. Rev. 416 (1947); Sellar, A Century of Commissions of Inquiry, 25 Can. B. Rev. 1 (1947).

¹⁶ Senate Resolution 46, 80th Cong. 1st sess.

¹⁷ These are taken from hearings before a Special Committee Investigating the National Defense Program, U. S. Senate (1947), 80th Cong. 1st sess. pt. 40, pp. 23916-23919.

Mr. Slack. That, at least heretofore, that had not been considered the duty of the United States Senate.

Senator Cain. Let me ask you a question.

Senator Ferguson. [Temporary Committee Chairman] Is that a question?

Senator Cain. Yes, sir; let me ask him this question: Do you know whether the Department of Justice has examined into the status that is, the draft status, of the witness who presently is under oath before this committee?

Mr. Slack. I do not, but if there is any question about it, I am sure they would be glad to do so, where they can hear all of the evidence, instead of part of the evidence.

Senator Ferguson. Just a moment. Senator Cain, you may proceed.

Senator Cain. Thank you very much.

Senator Ferguson. You may proceed with the examination.

Senator Cain. I am delighted by the inquiry of the gentleman [Mr. Slack] who has been sitting at this table for a number of days, who has had available to him the record, as I understand it, as I have had it, and I am not annoyed that he has inferred an inquiry which in itself . . . would help to defeat the justice we seek to achieve as the result of these hearings.

How many dependents did you have in 1941, Mr. Meyer?

Mr. Meyer. Four.

Senator Cain. Four?

Mr. Meyer. Yes.

Senator Cain. Who were they, may I ask?

Mr. Meyer. My mother, my dad, two aunts, and they all live, we all live together.

Senator Cain. They all live together?

Mr. Meyer. Live in my apartment in Hollywood.

Senator Cain. If it's a fair question, and I understand you are on very sound ground not to answer any question you do not care to, what was their status? That is, the financial status.

Senator Ferguson. So that may be clear to the witness, I think what Senator Cain has in mind, and I should advise you, that you are not required to answer any questions that would tend to incriminate you; you have the privilege of refusing to answer on the ground that any question asked would tend to incriminate you or tend to degrade you. So that you may know the legal significance of your answer.

Mr. Meyer. I would just as soon give the answer, but I would first like to talk to Mr. Slack. May I do that?

Senator Cain. I would appreciate Mr. Slack sitting next to you, if he would care to.

Mr. Slack. I would be glad to.

Senator Ferguson. Just a moment. Is Mr. Slack your counsel?

Mr. Meyer. He is the representative of the Hughes Tool Company. That is right.

Senator Ferguson. He is going to represent you now?

Mr. Meyer. Yes.

* * *

Senator Ferguson. Will you be sworn, Mr. Slack?

Mr. Slack. I will.

Senator Ferguson. Do you solemnly swear that in the matter now pending before this committee you will tell the truth, the whole truth, and nothing but the truth?

Mr. Slack. I do.

Senator Cain. Yesterday, Mr. Slack, Mr. Meyer volunteered the observation that he had first been deferred from the draft because he had four dependents. I merely asked him today against the answer that he gave yesterday as to whether or not that answer was correct, and he said it was.

I have before me a file which presumes to be Mr. Meyer's draft status, and under the date of March 24, 1941, Mr. Meyer was classified 3-A, because he had dependents, and it only mentions that he had a father and mother. That does not necessarily mean, obviously, that he did not have the two aunts which he claims as his dependents, but I wanted to get his opinion.

Mr. Slack. And my statement to you, Senator, was along the line that I believe was suggested by Senator Brewster himself on yesterday, that if anyone in connection with this proceeding is believed to have been guilty of any offense, why is it not referred to the Department of Justice where all of the facts are brought out in a true inquisitorial manner, rather than here where part of the facts only are produced?

* * *

Mr. Slack. I cannot see that Mr. Meyer's draft status is a proper issue within the terms of the Senate resolution.

Senator Cain. Will you permit me to make several inquiries which may result in your changing your mind?

Mr. Slack. I do not have it in my power to stop you, Senator, if I otherwise would.

* * *

Suppose it was a fictitious Mr. Smith and not Mr. Meyer who was involved in the above controversy. Suppose, further, that Mr. Smith was fearful of the possibility of a prosecution

for draft evasion—fearful that the testimony which he might be asked to give might directly be used in a subsequent criminal proceeding against him, or that it might indirectly lead to the searching out of testimony of other witnesses which could possibly be used against him in such a proceeding. What counsel would you give, knowing full well that a wrong answer might subject Smith to either or both of the following: (1) the contempt powers of the legislative body authorizing the investigation, i.e., the power to imprison an offender up until the time of the adjournment of the particular Congress, *Anderson v. Dunn*, 6 Wheaton 204 (1821), and (2) the imposition of a statutory criminal penalty upon the offender. It should be noted that both powers may be exercised simultaneously without running afoul of the “double jeopardy” limitation of the Constitution, because they relate to two separate offenses. See *Jurney v. MacCracken*, 294 U. S. 125, 151, 79 L. ed. 802, 55 S. Ct. 375 (1934).

Consider the following statutory and case materials and the subsidiary problems in the formulation of your advice:

Statutory Materials

“Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.” (2 U. S. C. § 192, R. S. § 102; June 22, 1938, ch. 594, 52 Stat. 942).

“No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.” (2 U. S. C. § 193, R. S. § 103; June 22, 1938, ch. 594, 52 Stat. 942).

“Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint commit-

tee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." (2 U. S. C. § 194, R. S. § 104; July 13, 1936, ch. 884, 49 Stat. 2041; June 22, 1938, ch. 594, 52 Stat. 942.)

"No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." (28 U. S. C. § 634, R. S. § 859; June 22, 1938, ch. 594, 52 Stat. 943.)

CASE MATERIALS

SINCLAIR v. UNITED STATES

Supreme Court of the United States, 1929
279 U. S. 263, 73 L. ed. 692, 49 S. Ct. 268

[Corporations with which Sinclair was identified had procured leases of government oil lands; the Senate adopted a resolution authorizing a committee "to investigate this entire subject of leases with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources." After a hearing, in which Sinclair testified, the Senate issued Resolution 54 reciting that certain leases were procured by fraud; and directing the President to cause suits to be instituted. After the institution of both criminal and civil suits, Sinclair was again ordered to appear before the investigating committee. The question asked him was: "Mr. Sinclair, I [Senator Walsh] desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that." Sinclair, refusing, was

indicted and convicted under Sections 102 and 104 of the Revised Statutes.]

Mr. Justice BUTLER. * * *

* * *

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation. Appellant makes no claim that the evidence was not sufficient to establish the innuendo alleged in respect of the question; the record discloses that the proof on that point was ample.

Congress, in addition to its general legislative power over the public domain, had all the powers of a proprietor and was authorized to deal with it as a private individual may deal with lands owned by him. *United States v. Midwest Oil Co.*, 236 U. S. 459, 474, 59 L. ed. 673, 35 S. Ct. 309. The committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function.

Before the hearing at which appellant refused to answer, the committee had discovered and reported facts tending to warrant the passage of Senate Joint Resolution 54 and the institution of suits for the cancellation of the naval oil reserve leases. Undoubtedly it had authority further to investigate concerning the validity of such leases, and to discover whether persons, other than those who had been made defendants in the suit against the Mammoth Oil Company, had or might assert a right or claim in respect of the lands covered by the lease to that company.

The contract and release made and given by Bonfils and Stack related directly to the title to the lands covered by the lease which had been reported by the committee as unauthorized and fraudulent. The United States proposed to recover and hold such lands as a source of supply of oil for the Navy. S. J. Res. 54. *It is clear that the question so propounded to appellant was pertinent to the committee's investigation touching the rights and equities of the United States as owner.*

Moreover, it was pertinent for the Senate to ascertain the practical effect of recent changes that had been made in the laws relating to oil and other mineral lands in the public domain. The leases and contracts charged to have been unauthorized and fraudulent were made soon after the executive order of May 31,

1921. The title to the lands in the reserves could not be cleared without ascertaining whether there were outstanding any claims or applications for permits, leases or patents under the Leasing Act or other laws. It was necessary for the Government to take into account the rights, if any there were, of such claimants. The reference in the testimony of Bonfils to the contract referred to in the question propounded was sufficient to put the committee on inquiry concerning outstanding claims possibly adverse and superior to the Mammoth Oil Company's lease. The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

The question of pertinency under § 102 was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. * * *

The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under §102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury. *Interstate Commerce Commission v. Brimson, supra*, 489. *Horning v. District of Columbia*, 254 U. S. 135, 65 L. ed. 185, 41 S. Ct. 53.

There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. *Armour Packing Co. v. United States*, 209 U. S. 56, 85, 52 L. ed. 681, 28 S. Ct. 428. *Standard Sanitary Mfg. Co.*

v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 33 S. Ct. 9.

* * *

Judgment affirmed.

COUNSELMAN v. HITCHCOCK

Supreme Court of the United States, 1891
142 U. S. 547, 35 L. ed. 1110, 12 S. Ct. 195

[Counselman was haled before a grand jury which was investigating alleged violations of the Interstate Commerce Act. He refused to respond to certain questions on the ground that his answers might tend to incriminate him. Accordingly, he was cited for contempt of court by the District Court, and committed to custody. The Circuit Court affirmed, discharging the writ of habeas corpus, and held that Counselman was amply protected by the following provisions of Section 860 of the Revised Statutes: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." Counselman appealed.]

* * *

Mr. Justice BLATCHFORD— * * * It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to incriminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all). the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted.

His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.

It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

It is argued for the appellee that the investigation before the grand jury was not a criminal case, but was solely for the purpose of finding out whether a crime had been committed, or whether anyone should be accused of an offense, there being no accuser and no parties plaintiff or defendant, and that a case could arise only when an indictment should be returned. In support of this view reference is made to article 6 of the amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, to be confronted with the witness against him, to have compulsory process for witnesses, and the assistance of counsel for his defense.

But this provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments, is much narrower than a "criminal case," under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

* * *

It remains to consider whether § 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal pro-

ceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself"; and the protection of § 860 is not coextensive with the constitutional provision. Legislation can not detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress can not amend the Constitution, even if it should engraft thereon such a proviso.

* * *

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. * * * Section 860, * * * affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.

* * *

From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer. The judgment of the Circuit Court must, therefore, be

Reversed. * * *

SUBSIDIARY PROBLEMS

1. The Counselman case is concerned with the constitutional protection against self-incrimination as it relates to grand jury

investigations. Is the same protection applicable to Congressional investigations? Are the same constitutional considerations which, according to the Counselman decision, are applicable to section 860 of the Revised Statutes also applicable to section 859 of the Revised Statutes (28 U. S. C. § 634, p. 485 *supra*)? See generally, Applicability of Privilege Against Self-Incrimination to Legislative Investigations, 49 Columbia L. R. 87 (1949).

2. Assuming, *arguendo*, that the answer to the last question is in the affirmative, would you recommend to Smith in Problem A that (a) he abstain from answering questions which might incriminate him, because section 859 of the Revised Statutes does not offer sufficient immunity, or that (b) he testify, because, even though section 859 may not be sufficient, the Constitution itself nevertheless provides the full protection?

Problem B:

Could the jurisdiction of the investigating committee in Problem A be attacked on the ground that the Senate resolution which created the committee did not specifically set forth the ultimate objectives of the investigation—e. g. to introduce corrective legislation if the investigation exposes fraud, corruption, etc., or to aid in unearthing data that might be used by prosecuting officials? Consider in this connection *In re: Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 S. Ct. 677 (1896).

Problem C:

Suppose that from questions and statements made by committee counsel during the course of the investigation in Problem A it is hinted that Smith evaded the draft; and that, as a result, criminal prosecution was begun. May Smith claim immunity from prosecution by virtue of the Fifth Amendment? See *United States v. De Lorenzo*, 151 F. (2d) 122, 126 (1945).

INQUIRY INTO POLITICAL BELIEFS

Problem D:

1. Suppose Smith had been asked whether he was a member of the Democratic party. Aside from the question of relevance, may Smith refuse to testify on the ground that this invades the realm of political beliefs, and that, inasmuch as Congress lacks the constitutional power to legislate concerning such matters, no such inquiry may be made by the Committee?

2. Is the investigating power confined only to those matters upon which Congress may constitutionally legislate, or is it sufficient that the subject matter is merely related to any mat-

ter upon which Congress is authorized to legislate? Suppose, for example, that the Committee investigating the Hughes-Kaiser aircraft contracts wished to ascertain whether political favoritism had anything to do with the contract awards. Assuming, *arguendo*, that Congress could not validly legislate with respect to political beliefs, could it nevertheless be maintained that the question of Smith's political affiliation might shed light on a problem with which Congress has the power to deal, e. g., " * * * excessive profits * * * corruption, waste * * * [etc.] in expenditures connected with the prosecution of the national defense?"

3. Do the phrases "pertinent to the question under inquiry" in section 102 of the Revised Statutes, and "pertinent to the subject under inquiry" in section 104 satisfy the requirement of explicitness in criminal statutes? How would Smith with reasonable certainty know beforehand whether membership in a certain political party was "pertinent" to the inquiry? Would he not be taking a gambler's chance in case a question were on the borderline of "pertinency?"

4. May it be argued that anything is within the purview of Congressional inquiry on the ground that it possibly may become the subject matter of an amendment to the Constitution?

Consider the following cases and the related materials contained therein in your attack upon the various phases of Problem D:

CASE MATERIALS

UNITED STATES v. JOSEPHSON ¹⁸

Circuit Court of Appeals, Second Circuit, 1947
165 F. 2d 84

CHASE, Circuit Judge.—The appellant was found guilty by a jury after a trial in the District Court on an indictment reading as follows:

"(1) Pursuant to Public Law 601, 79th Congress, 60 Stat. 812, and House Resolution 5, 80th Congress, dated January 3, 1947, including the Rules of Congress therein adopted and amended, the House of Representatives was empowered to and did create the Committee on Un-American Activities, having duties and powers as set forth in said Resolution.

"(2) On the 5th day of March, 1947, at the Southern District of New York, Leon Josephson was summoned as a witness, by authority of the House of Representatives through its Subcommittee of the Committee on Un-American Activities, to be sworn and to testify before the said Subcommittee on matters of inquiry committed to said Committee.

¹⁸ The selected footnotes have been renumbered.

"(3) Leon Josephson did appear before the said Sub-Committee, pursuant to subpoena served upon him, at its session in the Federal Court Building, Southern District of New York, on March 5, 1947, but then and there refused to be sworn and to give any testimony before said Committee (Title 2, United States Code, Section 192)."

The above named statute under which he was indicted provides in so far as presently pertinent that: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, * * *." Rev. Stat. § 102, as amended, 52 Stat. 942, 2 U. S. C. A. § 192.

The Committee on Un-American Activities has been duly authorized under the Legislative Reorganization Act of 1946 to conduct investigations "of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 60 Stat. 812, 828. The provisions of this statute were incorporated in the rules of the House of Representatives of the Eightieth Congress by House Resolution 5, January 3, 1947.

After motions to set aside the verdict and in arrest of judgment had been denied, sentence was imposed and the appeal is from the final judgment. The appellant raises questions as to * * * the constitutionality of the law authorizing the committee to investigate * * *

* * *

* * * The appellant's arguments are several and will be considered in turn.

He first claims that, since Section 192 does not in and of itself provide an explicit guide to conduct, i. e., set forth what questions are pertinent to the matter under inquiry, but requires reference to the authorizing act, the latter is for purposes of this case a penal statute. Cf. *M. Kraus & Bros., Inc. v. United States*, 327 U. S. 614, 621, 622, 66 S. Ct. 705, 90 L. ed. 894. He then argues that, if this be true, the statute is so vague and indefinite as to be unconstitutional, relying upon *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 83 L. ed. 888; *Herndon v. Lowry*, 301 U. S. 242, 261, 57 S. Ct. 732, 81 L. ed.

1066; and other similar cases. But this point is not available to the appellant. By refusing to testify at all he refused to answer any questions that were pertinent as well as those that were not and thus he was not put to the decision he argues could not have been made, viz., whether or not any particular question was pertinent. We may, therefore, put aside his contention that the language of the authorizing statute is so vague that a witness before the committee has no criteria to indicate in doubtful cases what questions asked would have the requisite pertinence. Here it is enough to say, and the appellant as much as concedes, that some questions could and perhaps would have been put that were pertinent to the inquiry, no matter how vague were these criteria. At the very least the language of the authorizing statute permits investigating the advocacy of the idea that the Government or the Constitutional system of the United States should be overthrown by force, rather than modified by the peaceful process of amendment of the Constitution set forth in Article V. The vice of vagueness in that language, if any, lies in the possibility that it may authorize, though we do not decide that it does so, investigations relating to the advocacy of peaceful changes. The appellant could, for example, have been asked whether he knew of propaganda activities designed to bring about the immediate destruction of the Government by violence and the question, as he clearly would have known, would have been pertinent. Having refused to answer any questions whatsoever, he can not now claim that the authorizing statute is invalid merely because it did not furnish him with criteria that were sufficiently definite to permit him to determine the pertinency of some question that might never have been asked.

It is next seriously argued that any investigation made by the committee as now authorized would necessarily have as its subject the "private affairs of private citizens" and it is pointed out that in the only case¹⁹ in which the Supreme Court has passed on a resolution empowering that kind of an investigation the resolution was held invalid. Whether that case should now be treated as barring an investigation because private affairs may be made public is open to question.²⁰ This, however,

¹⁹ *Kilbourne v. Thompson*, 103 U. S. 168, 26 L. ed. 377; see also *Sinclair v. United States*, supra, 279 U. S. 263 at pages 292-294, 49 S. Ct. 268, 73 L. ed. 692.

²⁰ See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 219: "*Kilbourne v. Thompson* also resurrects the argument made by John Quincy Adams in 1834 that the non-official conduct of a citizen is immune from Congressional scrutiny. Some quality akin to the 'right of privacy' seems to attach itself as a penumbra to this conduct, sheltering it from the probing inquiries of Congressional committees. Established privileges of immunity, of course, exist before such committees as well as before courts of law. But the mere fact that by a subpoena duces tecum a court is subjecting to the public gaze

we need not decide. It is sufficient to say that the subject of the Committee's investigations was, as the statute and resolution show, the extent, character, and objects of propaganda activities in this country which were designated Un-American; the diffusion within this country of subversive and Un-American propaganda which attacks the principle of the form of government that is guaranteed by the Constitution; and all related questions that would aid Congress in any remedial legislation. This subject was sufficiently broad in scope so that the information sought to be gained for the use of the Congress would be comprehensive and adequate, but was nevertheless confined to certain types of propaganda about the potency of which there can be little doubt. If such propaganda takes the form of, for example, advocacy of the overthrow of the Government by violence, it is rightfully called "Un-American" and a sensible regard for the self-preservation of the nation may well require its investigation, with a view to the enactment of whatever remedial legislation may be needed or to the amendment thereof.²¹ One need only recall the activities of the so-called fifth columns in various countries both before and during the late war to realize that the United States should be alert to discover and deal with the seeds of revolution within itself. And if there be any doubts on the score of the power and duty of the Government and Congress to do so, they may be resolved when it is remembered that one of the very purposes of the Constitution itself was to protect the country against danger from within as well as from without. * * * Surely, matters which potentially affect the very survival of our Government are by no means the purely personal concern of anyone. And investigations into such matters are inquiries relating to the personal affairs of private individuals only to the extent that those individuals are a part of the Government as a whole. The doctrine of *Kilbourne v. Thompson*, *supra*, is, then, not here involved. *Sinclair v. United States*, *supra*, 279 U. S. at page 294, 49 S. Ct. at page 272.

The appellant contends, however, that this committee's investigations are made not for any legislative or remedial purposes but only in order to "expose the political beliefs and affilia-

the private affairs or private business of a citizen has never been suggested as a bar to the court's process."

²¹ It is to be noted that the Subversive Activities Statute, 54 Stat. 670, 18 U. S. C. A. §§ 9-13, makes it a crime, among other things, "to knowingly or willfully advocate * * * overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; * * *." The constitutionality of this statute has been upheld in *Dunne v. United States*, 8 Cir., 138 F. 2d 137, certiorari denied, 320 U. S. 790, 64 S. Ct. 205, 88 L. ed. 476, rehearing denied 320 U. S. 814, 64 S. Ct. 260, 88 L. ed. 492.

tions of individuals and groups." We are told that these inquiries are "an imposition upon the individual or group investigated" and that "notoriety is an effective method of silencing and discrediting a political opponent." In contrast to this, however, may be compared the recently published Report of the President's Committee on Civil Rights (Government Printing Office, 1947), where it is stated that "The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups (p. 52)." It is pointed out that "In the political realm, the Federal Communications Commission, the Post Office Department, the Clerk of the House of Representatives, and the Secretary of the Senate—all of these under various statutes—are required to collect information about those who attempt to influence public opinion (pp. 52-53)." And, indeed, one of the committee's several recommendations to strengthen civil liberties is "The enactment by Congress and the state legislatures of legislation requiring all groups, which attempt to influence public opinion, to disclose the pertinent facts about themselves through systematic registration procedures (p. 164)." But we have no occasion now to decide whether a Congressional investigation may have exposure as its principal goal or when, if ever, a statute may. It is sufficient to say that the authorizing statute contains the declaration of Congress that the information sought is for a legislative purpose and that fact is thus established for us * * * regardless of any statement by the Committee or its members intimating the contrary. The fact that there may be "exposure" incidental to the inquiry goes only to the question of freedom of speech, which we discuss below.

It is, of course, well settled that Congress may make investigations in aid of legislation. * * * And it is immaterial that in the past this particular committee has proposed but little legislation. * * * Information gained by a committee of this nature, provided its search for the truth may not be frustrated by such obstructive tactics as those employed by the appellant, might well aid Congress in performing its legislative duties, viz., in deciding that the public welfare required the passage of new statutes or changes in existing ones or that it did not. * * * Some of these duties are imposed not only by the principle that the Government shall preserve itself, but, of course, by express provisions in the Constitution. Thus among the purposes of the Constitution, as expressed in the Preamble, are to "insure domestic Tranquility," to "provide for the common defense," to "promote the general welfare," and to "secure the Blessings of Liberty." Art. 1, sec. 8 gives Congress

the power to "provide for the common Defense," "to raise and support Armies," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval Forces," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. IV, Sec. 4 provides that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion" and on application "against domestic Violence." More specifically, as Judge Holtzoff said in *United States v. Bryan*, D. D. C., 72 F. Supp. 58, 62: "That the subject of un-American and subversive activities is within the investigating power of the Congress is obvious. Conceivably, information in this field may aid the Congress in legislating concerning any one of many matters, such as correspondence with foreign governments (U. S. C. A. Title 18, § 5); seditious conspiracy (Id. § 6); prohibition of undermining the morale of the armed forces (Id. § 9); suppression of advocacy of overthrow of the Government (Id. § 10); the registration of organizations carrying on certain types of propaganda (Id. §§ 14 and 15); qualifications for entering and remaining in Government service; the authorization of Governmental radio broadcasts to foreign countries; and other innumerable topics. Similarly such information may be helpful in appropriating funds." Though this list is ample for our purposes, it may be added that newspapers and other periodicals must file and publish statements showing their management and ownership to obtain second-class mailing privileges, 39 U. S. C. A. § 233; and foreign agents must register with the Attorney General if they engage in political activity, 22 U. S. C. A. §§ 601, 611 *et seq.*

Despite all this it is argued in behalf of this appellant that the First Amendment forbids the gathering of information by a duly authorized Congressional Committee or its sub-committee regarding propaganda activities. If this be true, the Constitution itself provides immunity from discovery and lawful restraint for those who would destroy it. The theory seems to be that the investigation of Un-American or subversive propaganda impairs in some way not entirely clear the freedom of expression guaranteed by the Bill of Rights.

It may be doubtful whether this appellant can raise the issue without more to show that the free exercise of his rights has been impaired in some way. And the statute not purporting to license the dissemination of ideas, the case seems unlike *Thornhill v. State of Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093, and it perhaps would not be difficult for us to rest our decision on the ground that the appellant has no standing to challenge the statute on its face. We shall resolve this doubt in

favor of the appellant, however, in order to give him the full benefit of being able to contest this exceedingly important point.

The argument of the appellant and the amici is in substance that the Committee's power to investigate is limited by Congress' power to legislate; Congress is prohibited from legislating upon matters of thought, speech, or opinion; ergo, a statute empowering a Congressional committee to investigate such matters is unconstitutional. The mere statement of this syllogism is sufficient to refute it. Congress obviously can use information gathered by this Committee to pass legislation not encroaching upon civil liberties, as above noted. The appellant's argument necessarily, therefore, is reduced to the absurd proposition that because the facts resulting from the Committee's investigations conceivably may also be utilized as the basis for legislation impairing freedom of expression, the statute authorizing such investigations must be held void. But clearly Congress can and should legislate to curtail this freedom at least where there is a "clear and present danger" that its exercise would, as by armed rebellion or external attack, imperil the country and its Constitutional system, including, until amended, the peaceful process of amendment. *Schenck v. United States*, 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. ed. 470. Such legislation might ultimately be the only means for the preservation of this freedom. To draw again from the Report of the President's Committee on Civil Rights, "The most immediate threat to the right to freedom of opinion and expression" consists of two groups, the Communists and Fascists, both of which "often use the words and symbols of democracy to mask their totalitarian tactics. But their concern for civil rights is always limited to themselves. Both are willing to lie about their political views when it is convenient. They feel no obligation to come before the public openly and say who they are and what they really want (p. 48)." At the same time, as yet Congress has not determined that there is such a clear and present danger from these groups that their freedom to attempt to influence the public to adopt their views should be abridged, and until Congress validly does so, if ever, that freedom should be zealously guarded. But surely this does not mean that Congress cannot collect facts that would enable it to ascertain whether such a danger exists from these quarters or any others.

The appellant's argument runs counter to the very purpose of the First Amendment. The power of Congress to gather facts of the most intense public concern, such as these, is not diminished by the unchallenged right of individuals to speak their minds within lawful limits. When speech, or propaganda, or whatever it may at the moment be called, clearly presents an immediate danger to national security, the protection of the

First Amendment ceases. Congress can then legislate. In deciding what to do, however, it may necessarily be confronted with the difficult and complex task of determining how far it can go before it transgresses the boundaries established by the Constitution. What has else here been said is equally applicable here: "The power of Congress to exercise control over a real estate pool is not a matter for abstract speculation but one to be determined only after an exhaustive examination of the problem. Relationships, and not their probabilities, determine the extent of Congressional power. Constitutionality depends upon such disclosures. Their presence, whether determinative of legislative or judicial power, cannot be relegated to guesswork," Landis, *supra* at page 217. Needless to say, this statement is all the more apt where the subject about which Congress is contemplating legislation is not abuse of power by a particular monopoly but at least partially concerns the delicate matter of free speech.

And it may be added, it is not for the courts to assume in advance that Congress will pass any legislation in violation of the First Amendment. We are told that there is no presumption of constitutionality where civil liberties are concerned. See, e. g., *Thomas v. Collins*, 323 U. S. 516, 529, 530, 65 S. Ct. 315, 89 L. ed. 430; *Schneider v. State*, 308 U. S. 147, 60 S. Ct. 146, 84 L. ed. 155; Note, 40 Col. L. Rev. 531. But though this may well be true as regards to already enacted legislation, it certainly does not mean, as the appellant would in effect have us believe, that we are to consider that legislation not yet passed is presumptively unconstitutional. Rather, the courts are to presume, until the contrary appears, that Congress will fulfill its obligation to defend and preserve the Constitution.

Thus the only real basis for the appellant's contention seems to be that in some way the First Amendment in protecting freedom of speech guarantees such privacy in speaking as the particular speaker may desire, and that this privacy is violated by whatever disclosure occurs incidental to an investigation for legislative purposes. This is a fallacy essentially based upon the idea that the Constitution protects timidity. Perhaps there are those who would indulge in any sort of propaganda activities covertly but not if they thought that what they did would become publicly known, and perhaps as regards them fear of disclosure is a deterrent which bolder persons would not heed. But this fear is not created by any legal restriction upon their right to conduct propaganda activities by means of speaking freely if they care to do so. They must, of course, take their chances, just as does any one else, that they keep within the bounds of lawful peaceful persuasion and refrain from activities looking toward the destruction of the Government by force. But

short of that there is no restraint resulting from the gathering of information by Congress in aid of its power and duty to legislate which does not flow wholly from the fact that the speaker is unwilling to advocate openly what he would like to urge under cover. Until there is a valid law to the contrary, he may with impunity say what he pleases so far as legal process is concerned and that is the extent of the freedom of speech guaranteed any one by the Constitution.

* * *

Judgment affirmed.

CLARK, Circuit Judge, dissents with separate opinion.

CLARK, Circuit Judge (dissenting).

I find it neither easy nor pleasant to disagree on this issue, one of the more momentous which has come before us. Despite hoary precedents, public satisfaction with judicial review of legislative acts has not been such as to invite judges to embark thereon hastily or willingly. Even in the field of civil rights, where we are admonished that the ordinary presumption in favor of constitutionality is either faint or nonexistent, it is not yet clear that the courts can accomplish permanent changes in the ways of men's thinking. Yet the precedents compelling scrutiny are precise and pointed, and the presence before us of one citizen deprived of his liberty and probably of his future livelihood makes it impossible to evade judicial responsibility to serve as that "haven of refuge" which the courts must offer a dissident minority. *Chambers v. Florida*, 309 U. S. 227, 241, 60 S. Ct. 472, 84 L. ed. 716. And the necessity of decision becomes all the more pressing when, as I think it obvious, no more extensive search into the hearts and minds of private citizens can be thought of or expected than that we have before us. If this is legally permissible, it can be asserted dogmatically that investigation of private opinion is not really prohibited under the Bill of Rights. In other words, there will then have been discovered a blank spot in the protective covering of that venerated document. Judges and courts, presidents and executive departments, together with all the administrative agencies, must conform; and, indeed, so must the legislature when exercising its prime function of legislating. Only when it refrains from carrying its activities to their constitutional climax will it, and it alone, be exempt from respecting the most cherished of all our democratic privileges. I cannot accept such a consequence and hence must express as best I may the reasons why I think this result is invalid.

As I have indicated, the precedents requiring judicial scrutiny of this legislative activity are beyond question; and conflict of view may arise only as to the proper outcome of the scrutiny in a particular case. The leading case is *Kilbourne v.*

Thompson, 103 U. S. 168, 190, 26 L. ed. 377, where the Court held invalid an investigation of a judicial nature into the possible losses of the United States on the failure of Jay Cooke & Co. and upheld an action for false imprisonment brought by a recalcitrant witness against the Sergeant-at-Arms of the House of Representatives. Speaking for a unanimous court, Justice Miller in the course of an historical survey trenchantly stated that "we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

Later cases which have upheld investigations of official wrongdoing have quoted and followed this statement. Thus, in *Sinclair v. United States*, 279 U. S. 263, 291, 292, 49 S. Ct. 268, 73 L. ed. 692, the Court in reiterating the principle stated in *McGrain v. Daugherty*, 273 U. S. 135, 173, 47 S. Ct. 319, 71 L. ed. 580, 50 A. L. R. 1, that neither House of Congress was invested with general power to inquire into private affairs and compel disclosures, but only with limited power of inquiry to carry out its constitutional function, went on: "And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry."

"It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions." (279 U. S. 263, 292, 49 S. Ct. 271.) And the Court then proceeded to quote from *Kilbourne v. Thompson*, *supra*, 103 U. S. 168, 26 L. ed. 377; *In re Pacific Ry. Commission*, C. C. N. D. Cal., 32 F. 241, from the opinion of Mr. Justice Field at page 250; and *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 S. Ct. 1125, 38 L. ed. 49. See also *In re Chapman*, 166 U. S. 661, 17 S. Ct. 677, 41 L. ed. 1154; *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. ed. 802; and particularly *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448, 61 L. ed. 881, L. R. A. 1917 F. 279, Ann. Cas. 1918B, 371, reversing *United States ex rel. Marshall v. Gordon*, D. C. S. D. N. Y., 235 F. 422, where the

Court held invalid a legislative sentence of imprisonment for contempt for the writing of a defamatory letter to a subcommittee of the House. So, too, the power and the duty of the courts to scrutinize congressional investigations, lest they transcend constitutional limitations, has been constantly assumed and reiterated by text writers.²²

Hence the somewhat general popular assumption that the congressional power of investigation has no apparent limits is quite contrary to settled precedents. Indeed, the United States Attorney, with becoming frankness, concedes as much. We must turn therefore to the authorizing resolution and statute under which this Committee acted. It is desirable at the outset, however, to define our present problem and show its necessary limits. In a discriminating review, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416, 426, 429, it is said that "there are three possible constitutional objections which may be raised against the validity of an inquiry like that undertaken by the Committee on Un-American Activities: (1) Congress can not undertake a completely unlimited inquisition in the area protected by the First Amendment. (2) The purpose of the Committee to accomplish by publicity what cannot validly be done by legislation renders the whole investigation unlawful. (3) A standard of guilt sufficiently definite to allow enforcement of the Committee's demands by penal sanctions is not established." It is clear that the writer finds the third the most serious of all. Thus, after stating the standards for the wording of a penal statute, he continues: "Logically, a similar rule should apply to enactments authorizing congressional investigations which are to be aided by a broadly worded criminal statute. It is doubtful whether the measures authorizing the Committee meet any of these standards. Viewed in this light, there are serious constitutional objections to a conviction under section 192 of any witness who refuses to answer a question put to him by the Committee."

Now the problem before us, and the only one at this time, is whether or not the conviction of this defendant under 2 U. S. C. A. § 192 is valid. We have not before us other aspects of the Committee's activities, involving, for example, the voluntary testimony of witnesses disparaging of others, the

²² McGeary, *The Developments of Congressional Investigative Power*, 1940, 106, 114; Hamilton, *The Inquisitorial Power of Congress*, 23 A. B. A. J. 511; Stebbins, *Limitations of the Powers of Congressional Investigating Committees*, 16 A. B. A. J. 425; Dimock, *Congressional Investigating Committees*, Johns Hopkins Univ. Studies in Historical and Political Science, Ser. 47, No. 1, 1929, 117, 149, 153-158; Eberling, *Congressional Investigations*, 1928, 383; Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 220; 1 Wigmore on Evidence, 3d Ed. 1940, § 4k; 8 id. § 2195; 47 Col. L. Rev. 416; discussed *infra*.

possible incidence of the law of libel, and so on. Questions as to these matters may await the framing of definite issues presenting them; here we should pass only upon the one issue whether or not this defendant was properly deprived of his liberty. Hence we have to consider the third ground suggested by the writer reinforced so far as here pertinent by the question as to the First Amendment suggested by the first ground.

Now the statute itself is general, making no attempt to define pertinent inquiries of Congress. Obviously it must be filled out by the form and expression of authorization in a particular case. We turn therefore to the key words of the resolutions creating and continuing the original Committee and the statute passed last year which is the present authority for the Committee's actions. These are all in the same wording, making the adjective "un-American," without further definition, the foundation stone of all the activities. Pub. L. No. 601, 79th Cong., 2d Sess., Aug. 2, 1946 § 121 (b) (1) (q), 60 Stat. 828. "The Committee is first authorized "to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States." Then continue further powers discussed below; even had these been more definite (as they are not), they would not have lessened the force, or the dangerous vagueness, of this initial broad grant. All attempts to explain the meaning of the key word "un-American," either on the original creation of the Committee or on its later renewals, have been avoided or opposed. On the other hand, there has been a definite and successful intent to continue this Committee without any restriction as to its scope, and hence, as characterized by one of its members, as "the most powerful" committee of Congress.²³

The Sinclair case indicates that the actual construction of the authorizing resolution by a committee may have some bearing on its interpretation. But the experience of this Committee's activities now for nearly a decade is instructive in the contrary direction, that is, as showing that there are no bounds to its asserted and exerted powers. A review of these activities need not be undertaken here, since it has been done thoroughly elsewhere and since the various committee reports, congressional debates, addresses and articles of members, and general publications are freely available. It has never made any secret of its strength and its intent to use that strength to the utmost. Suffice it to say here that its range of activity

²³ For detailed citations see 47 Col. L. Rev. 416 *et seq.*; Ogden, The Dies Committee, 2d Rev. Ed. 1945, 38 *et seq.*; and see also *United States v. Lovett*, 328 U. S. 303; 308-313, 66 S. Ct. 1073, 90 L. ed. 1252.

has covered all varieties of organizations, including the American Civil Liberties Union, the C. I. O., the National Catholic Welfare Conference, the Farmer-Labor party, the Federal Theatre Project, consumers' organizations, various publications from the magazine "Time" to the "Daily Worker," and varying forms and types of industry, of which the recent investigation of the movie industry is fresh in the public mind. While it has avoided specific definition of what it is seeking, it has repeatedly inquired as to membership in the Communist party and in other organizations which it regards as Communist controlled or affected. It has claimed for itself the functions of a grand jury to focus the spotlight of publicity on those it considers subversive, in order to drive them from their jobs in private and government employment and their offices in the trade unions. It has gathered a file of over 1,000,000 persons and organizations claimed to be a "file on every known subversive individual and organization in the United States today," and has submitted lists of allegedly subversive government employees to the Attorney General for investigation. Generally speaking it has avoided the suggestion of legislation. No legislation has come from the Committee itself. Its activities, however, are considered to have led to the legislation held unconstitutional as a bill of attainder in *United States v. Lovett*, 328 U. S. 303, 66 S. Ct. 1073, 90 L. ed. 1252. Hence neither the legislative authority nor the actions pursuant to it suggest or permit any limitations on the investigation of the spoken or written word.

If, on the other hand, we look to contemporary thought in the matter we find a like vagueness in the adjective. Perhaps the nearest to concreteness is in the emphasis made by certain leading industrial organizations and others upon what they like to call the "American way" or the "American theory of free enterprise." It is not a strained interpretation to consider that the converse trend, strongly resisted by many of our citizens (as, of course, was their undoubted right), which led to increased governmental regulation a decade ago, could be included in the intended content of the investigation. As a matter of fact, the testimony at the recent movie investigation found the necessary Un-American qualities for which the Committee was searching in films which placed bankers in an unfavorable light or talked "against the free enterprise system."

Further subdivisions of Public Law 601 introduce the concepts of subversive propaganda attacking the principle of our form of government, viz., "(ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic

origin and attacks the principles of the form of government as guaranteed by our Constitution." The word "subversive" here conveys no additional meaning, since that is a term completely undefined in this Act or elsewhere in our Criminal Code. And the clause as to attacking the principle of our form of government, as guaranteed by our Constitution, can not be given any specific content. The freedom of amendment permitted by our Constitution makes possible advocacy of the most extensive changes in our governmental form. It cannot be that the advocacy of amendments urging change in the relation, for example, of the Executive and Congress, the subject recently of several popular books, is subversive. In *Schneiderman v. United States*, 320 U. S. 118, 137, 144, 63 S. Ct. 1333, 1343, 87 L. ed. 1796, the Supreme Court noted the provisions for constitutional change by amendment, with the many changes since 1787, and held that these "refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution." It suggested, indeed, that if any principle was essential, it was freedom of thought. Would not a suggestion by either an American or an English scholar in the field of government that the English parliamentary system or the present program of the English Labor party contained useful object lessons for Americans come within the broad language and the broad interpretation of the authorization? After all, "subversive" means "tending to subvert," which, in turn, means "to pervert or corrupt (one) by undermining his morals, allegiance, or faith; to alienate." Webster's New International Dictionary, 2d Ed. Unabridged, 1939. But advocacy of a change in political thought is certainly an attempt to undermine the faith of the present. All of this points to and underlines the real vice of so vague and ambiguous an authority when so determinedly marshalled against minority views. It invites and justifies an attempt to enforce conformity of political thinking, to penalize the new and the original, to label as subversive or un-American the attempt to devise new approaches for the public welfare, in short to damn that very kind of initiative in experimentation which has made our democracy grow and flourish. Cf. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642, 63 S. Ct. 1178, 87 L. ed. 1628, 147 A. L. R. 674.

Since this is a penal statute we are called upon to enforce, standards so vague and doubtful should be adjudged insufficient under the settled requirements that prohibited conduct must for criminal purposes be set forth with clarity, so that the person to whom it applies may determine what conduct is legal and what is not. This has been often applied in the ordinary criminal law, as in *United States v. L. Cohen Grocery Co.*,

255 U. S. 81, 89, 41 S. Ct. 298, 85 L. ed. 516, 14 A. L. R. 1045, and more recently in *M. Kraus & Bros. v. United States*, 327 U. S. 614, 621, 66 S. Ct. 705, 90 L. ed. 894, holding too indefinite a Maximum Price Regulation of the Price Administrator under which criminal prosecutions had been undertaken. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, 83 L. ed. 888.

But we may pass beyond this defect to face the major issue whether or not an authorization so broad is compatible with the First Amendment. I think we can say without reservation of any kind that, had legislation been actually formulated in the exact terms of the authorization quoted, its unconstitutionality would have been conceded. As has been often pointed out, that Amendment, in securing freedom of speech against any abridgement by the Congress, does not authorize a partial lessening of the freedom or anything less than complete protection. True, in the well-known formula devised by Mr. Justice Holmes in *Schenck v. United States*, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, the Congress has a right to protect the safety of the state when that is endangered; and hence when words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" against which Congress may legislate, they may be prohibited or penalized. As lately defined in *Bridges v. California*, 314 U. S. 252, 263, 62 S. Ct. 190, 194, 86 L. ed. 192, 159 A. L. R. 1346, this means "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. * * * For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Now, when this country is at peace, it is hard to discern such circumstances of "clear and present danger." Indeed, the teaching of experience, after nearly three decades of a well-nigh pathological fear of "Communism," under constant investigation by Congress, Ogden, *The Dies Committee*, 2d Rev. ed. 1945, 14-37, might suggest that there was more to be feared from the fear itself than from the supposed danger. During that period we have had two major threats to our economy, but they have come from different sources. One (domestic) was the economic crisis of the thirties; the other (foreign) was the attack by Japan and Germany. Each compelled for its meeting the adoption of measures seemingly "un-American" in the present context. Moreover, the inhibiting influence of the fear on governmental

action upon both the domestic and the international fronts is quite obvious.

It is, of course, true that Congress, not the courts, has the responsibility of determining the need and extent of legislation within constitutional limits. And since it may forbid propaganda of dangerous proportions when it chooses, it obviously may investigate the need of such prohibition. But when it attacks not merely dangerous propaganda, but in effect all argumentation departing from the then norm, there is no justification for the wide reaches of its claim of authority. In truth, it seems not a matter of great difficulty to provide for an investigation of proper scope which would impress all as being constitutionally justified. For Congress has already been able to translate the constitutional formula into an adequate working tool of protection, as needed. In the Alien Registration Act of 1940, 18 U. S. C. A. § 10, it has defined the crime there legislated against in terms of knowing or willful advocacy of "the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government." Such a formula held constitutional in *Dunne v. United States*, 8 Cir. 138, F. (2d) 137, certiorari denied 320 U. S. 790, 64 S. Ct. 205, 88 L. ed. 476, could be easily made the appropriate yardstick of justified investigation into the evil reaches of treasonable propaganda.

It is contended, however, that the scope of the investigation is not to be defined in the same manner as the resulting legislation. But it is hard to see how the scope of the investigation can be broadened beyond the point of any possible valid legislation. An argument much stressed is that, since there is an area of legal activity for the Committee within the constitutional limitations, therefore the investigation as a whole is to be supported, and only illegal activities rejected. Passing the practical impossibility of then isolating anything as beyond the permitted investigatory scope, such a view is logically indefensible in the light of constitutional principles. Of course it is only the going beyond the constitutional limitation which ever renders legislative acts improper. True, one can say that the question is, as so generally, one of degree. But the excess is the important question here. The fact that a bucket of water may be life-giving to a man dying of thirst does not render foolish the attempt to curb the excesses of a raging torrent. Under this argument Congress might properly pillory a person for refusing to advocate the nationalization of private property generally because it has power to regulate private property, provided it does so with due process of law, or take it upon the award of just compensation. A doctrine

that the lesser legislative power always justifies the exercise of the greater investigative power, including control over opinion, will lead to strange analogies indeed!

Moreover, we must face the practical consequence of such a theory. Clearly it makes the power to investigate limitless. Since there is always an area of permissible activity to the legislature, for, indeed, its function is to legislate at large for the public good, the dram of good must always sanctify the dubious remainder. With such a thesis the power of suggesting constitutional amendments of unlimited scope could also be utilized to justify any sort of investigation—a thesis interestingly enough expressly rejected by an Australian chief justice. *Colonial Sugar Refining Co. v. Attorney-General*, 15 C. L. R. 182, 194, 195. And his decision was carried further on appeal, in *Attorney-General v. Colonial Sugar Refining Co.* (1914) A. C. 237, 252, 257, to the conclusion that, by reason of the excess of power, the entire grant to the legislative commission was invalid.

A corollary of this argument, one much pressed, is that only specific questions can be objected to by a witness before the Committee and that in cases such as the present, where the witness has not been sworn, he has no redress. But this, it is believed, is to confuse the issue before us here. We need to keep in mind the character of objections available at the examination proper. They will include personal privileges, such as that against self-crimination, in whatever attenuated form they still exist in legislative investigations,²⁴ and the pertinency of the question to "the question under inquiry." 2 U. S. C. A. § 192. But if the investigation is as broad as thus assumed, there is no logical or rational way of determining that the question is not pertinent to "the question under inquiry." How can it be said that even the stark question, "Are you a Communist?" is not pertinent to an inquiry into Un-American propaganda when the latter may be defined as broadly as it has been in actual Committee experience? The real objection is very clearly to the assumed scope of the investigation. Cf. *Attorney-General v. Colonial Sugar Refining Co.*, *supra*. That is a question of initial power, which should properly be raised at the outset of any

²⁴ The privilege against self-crimination, if claimed, is intended by 2 U. S. C. A. § 193; 28 U. S. C. A. § 634, not to excuse testifying but only to prevent use of the testimony for later criminal prosecution. For the problems raised by these statutes and the easy waiver of the privilege, see *United States v. De Lorenzo*, 2 Cir. 151 F. 2d 122; and compare Eberling, *Congressional Investigations*, 1928, 287, 288, 339, 389, 390, questioning their validity. The plea of privileged communications between lawyer and client seems not to have been sustained in the proceedings before Congress which led to *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. ed. 802. See Seabury, *The Legislative Investigating Committee*, 33 Col. L. Rev. 1-3.

inquiry by the person at whom it is directed. Logically he assumes the validity of the investigation if he starts to testify. Indeed, practically and legally there is a real question, under the extremely broad view of waiver developed with respect to appearances before congressional committees, whether he may not have waived any objection of validity by thus proceeding. See *United States v. De Lorenzo*, 2 Cir., 151 F. 2d 122. But even if so strict rules may not be applied, there seems nothing gained in any practical sense by a requirement that a witness must be sworn and give his name and address before he can resist the unconstitutional breadth of the investigation. Such a procedural formality has no reality in the context of the broad scope of the First Amendment.

Moreover, emphasis on this point of procedure belittles, as well as nullifies, the constitutional objection. Under our scheme of legal values constitutional issues must always be raised, if at all, by some persons affected thereby. They can not be considered and determined in vacuo. Nevertheless where those issues are of vast importance they should be considered in the light of their broad significance, and not wholly in the narrow concept of the single individual who presents them as a kind of vicarious avenger for the public weal. When we concentrate our gaze solely upon the refusal to testify as to party affiliations it is hard for us to feel very sympathetic with the refuser. The general feeling that one should stand up and show his true colors, particularly when, as here, the inquiry is given a strong patriotic tinge, has led naturally to the public confusion which mingles strong condemnation of Committee procedures with some belief in its assumed objective. This quite normal reaction that a Communist, as well as any one else, should say what he is when the fact is of importance to the public good could be allowed its natural scope if, first, however, the investigating authority is properly limited to constitutional objectives. Indeed, given a search directed against propaganda for the overthrow of the government by force or violence, it would seem perfectly fitting as a matter of detailed examination—to test a witness' denial of illegal activities—to inquire whether or not the person investigated was a member of any organization that advocated such principles. Hence, whenever the initial validity of the investigation is properly set forth, the investigation can then proceed in a workmanlike way to accomplish its express purpose, subject only to specific problems as to the pertinency of particular questions and the conduct of hearings, with particular reference to the procedural safeguards to be accorded the individuals under investigation.

I have not dwelt upon the question whether the Committee's activities, being in form directed only to investigation of words

and acts after they have taken place, can nevertheless be considered an abridgment of the freedom of speech. For it is too well established now for question that our Constitution does not follow the earlier English view of penalties after the event for such curtailment, but does prohibit any acts tending to prevent persons from exercising that broadly important right. *Grosjean v. American Press Co.*, 297 U. S. 233, 56 S. Ct. 444, 80 L. ed. 660; *Bridges v. California*, *supra*. Here there can be no doubt of that intended and actual consequence of the investigation. The Committee announces its desire that the persons it finds guilty shall forfeit their jobs in public and private industry and shall be subject to prosecution for any collateral crimes which may have been disclosed, and generally shall be exposed pitilessly to public condemnation. That it is successful in its purpose the daily papers show. There can be no doubt of the obvious and direct abridgment of the right freely to speak and express one's opinions which is thus achieved.

The right of congressional investigation has been so important, so productive of good in so many instances in our history, that no one would wish to hamper it improperly. And it is true, as many urge, that the force of public opinion and the expression of the electorate at the polls must remain its main source of control. But in the narrow, though important, field of constitutional liberties, more control is desirable. For the extreme power thus wielded carries the seeds of its own ruin if it is not constitutionally exercised. Indeed the mixed and confused public reaction to the activities of this Committee signifies as much. Any investigation involving the freedom of expression of views or beliefs is sure to be disturbing to our historical conceptions of democracy unless it is conducted to such ends and in such manner as to command the support of public opinion. Yet the Committee has been under constant and searching criticism from even the most conservative elements in our society, who can in no sense be guilty of "red" tendencies; while even those who support its objectives do so in general with more than an apology for its methods. Such a situation, even if legally invulnerable, is a potent source of weakness, preventive of any long-range accomplishment. Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse. For a widespread belief that the Committee is acting in an Un-American way to even an American end will destroy the Committee's usefulness in the eyes of "a liberty-loving people."

I would reverse for dismissal of the indictment.²⁵

²⁵ [Ed.] The Supreme Court denied certiorari, 1948, 333 U. S. 838, 68 S. Ct. 609.

BARKSKY v. UNITED STATES²⁶

United States Court of Appeals, District of Columbia, 1948
167 F. 2d 241

PRETTYMAN, Associate Justice.—The Supreme Court has denied certiorari, 1948, 333 U. S. 838, 68 S. Ct. 609, in *United States v. Josephson*, 2 Cir., 1947, 165 F. 2d 82. Nevertheless, because of the nature of the question involved and because we have a division of opinion, we state in full the reasons for our conclusion.

These appellants were indicted, tried before a jury, convicted, and sentenced for willful failure to produce records before a committee of the Congress pursuant to subpoenas, in violation of Section 192 of Title 2 of the United States Code Annotated.²⁷ The indictment alleged that appellants were members of the governing body of an unincorporated association known as the Joint Anti-Fascist Refugee Committee and that, having been subpoenaed by the Congressional Committee known as the Committee on Un-American Activities of the House of Representatives, to produce the records of their association relating to the receipt and disbursement of certain money and certain correspondence with persons in foreign countries, they willfully failed to produce those documents.

Upon the trial it was shown that the Congressional Committee existed by virtue of House Resolution No. 5 of the 79th Congress,²⁸ and that the Joint Anti-Fascist Refugee Committee was a private voluntary association engaged in the collection of funds from the public in this country upon representations that such funds were to be used for relief purposes abroad, and in the disbursement of those funds in foreign countries. It was further shown that the Congressional Committee had received "a large number" of complaints that the funds collected by appellants' organization were being used for political propaganda and not for relief. It made inquiry of the President's War Relief Control Board and, consistently with suggestions there obtained, requested that one of its investigators be permitted to examine the records of the collection and disbursement of the funds. This request was denied. Testimony, including that of an official of the State Department and a person who said that she had observed the operation of appellants' association abroad, was taken. In effect, this testimony sustained the burden of the complaints. Thereupon the Committee issued the subpoenas above described. Appellants appeared before the Committee but declined to produce, or to cause the production

²⁶ The selected footnotes have been renumbered.

²⁷ 1938, 52 Stat. 942.

²⁸ 79th Cong., 1st Sess., 90 Cong. Rec. 10, 15 (1945). The Resolution was carried into the Rules of the House as Rules X (a)-17 and XI (q)-1 and into the Legislative Reorganization Act of 1946, 60 Stat. 812, 828.

of, the described books and documents. They were thereupon indicted, as above described, and appeal from the judgments upon conviction.

Appellants' first point is that the Resolution creating the Congressional Committee was unconstitutional because it authorized inquiry into political opinion and expression, in violation of the First Amendment.

The Resolution which created this Congressional Committee authorized it by one of three subclauses to investigate "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."

These appellants were not asked to state their political opinions. They were asked to account for funds. We are unable to visualize the particular in which civil rights are violated by a requirement that persons who collect funds from the public in this country for relief purposes abroad account for the collection and distribution of such funds. Moreover, the fact of the existence of such official bodies as UNRRA and the President's War Relief Control Board, and the then-pending proposals for loans to foreign governments, clearly justified Congressional inquiry into the disbursement abroad of private funds collected in this country avowedly for relief but reasonably represented as being spent for political purposes in Europe.

Appellants' point is not premised upon the specific question asked them but upon the scope of possible inquiry under the Resolution. So we examine the contention in the light of the possibility, indicated by the preliminary data before the Committee, that answers to the inquiry might reveal that appellants were believers in Communism or members of the Communist Party.

The problem thus presented is difficult and delicate. In it we have not only the frequent "real problem of balancing the public interest against private security,"²⁹ but in this instance we must do so in the midst of swirling currents of public emotion in both directions. We are presented with extreme declarations in respect to Communists and equally extreme declarations in respect to the Congressional Committee. The duty of the courts is no less than to render judgment with utter detachment.

Congressional powers of investigation have been explored and debated by scholars for many years in the United States and other countries. We shall not venture upon a treatise on the subject but confine ourselves to the specific question before us.

²⁹ Mr. Justice Rutledge, in *Oklahoma Press Publishing Company v. Walling*, 1946, 327 U. S. 186, 203, 66 S. Ct. 494, 502, 90 L. ed. 614, 166 A. L. R. 531.

Nor shall we elaborate by discussion the principles we deem controlling. We state them and leave support of them to the authorities cited.

We think that even if the inquiry here had been such as to elicit the answer that the witness was a believer in Communism or a member of the Communist Party, Congress had power to make the inquiry.

The first phase of the question thus posed concerns the power of the Congress to inquire into the subject described in the above quotation from the Resolution.

Preliminary inquiry has from the earliest times been considered an essential of the legislative process. By it are to be determined both the advisability for and the content of legislation. So that even as to ordinary subjects, the power of inquiry by the legislature is coextensive with the power of legislation and is not limited to the scope or the content of contemplated legislation. Constitutional legislation might ensue from information derived by an inquiry upon the subject described in the quotation from H. R. Res. No. 5. That potentiality is the measure of the power of inquiry. The fact is that at least eight legislative proposals have been submitted to the Congress by this Committee as the result of its investigations.³⁰ Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry.

The permissible breadth of governmental investigation was indicated many years ago when the Supreme Court held that "the requiring of information concerning a business is not regulation of that business," and refused to confine investigation to activities which might be regulated. And that breadth has increased considerably in recent years. The Supreme Court has recently held that the First Amendment does not preclude a subpoena by an administrative official requiring a newspaper to disclose the interstate distribution of its paper, dissemination of its news, or the source and receipt of its advertisements;³¹ that it is not necessary that a charge of violation of law be pending, or that the inquiry be limited by "forecasts of the probable results of the investigation." The official might, the Court held, make "preliminary investigation of possibly existing violations," so long as the investigation be for a lawfully authorized purpose within the power of Congress to command. The power of Congress to investigate by means of a Committee of its own can be no less restricted than the power which it may validly confer upon an administrative official. In the case at

³⁰ H. R. Rep. No. 2742, 79th Cong., 2d Sess. (1947).

³¹ *Oklahoma Press Publishing Company v. Walling*, 10 Cir., 1945, 147 F. 2d 658, 659.

bar we do not approach the wide boundaries indicated by the Supreme Court in that case.

Moreover, the power to inquire into the subject described in this Resolution rests upon a foundation deeper than a mere auxiliary to the ordinary legislative or administrative process. Direct reference to fundamentals is justified in this connection.

The basic concept of the American system, both historically and philosophically, is that government is an instrumentality created by the people, who alone are the original possessors of rights and who alone have the power to create government. The choice of the existing form of government was by the people, and resulted from a conviction on their part that it was the best for the purposes of government. That this was a deep conviction and not a temporary fancy is evidenced conclusively by even a casual examination of the historical facts, beginning with the original settlements and extending through the adoption of the Federal Constitution. The prime function of government, in the American concept, is to preserve and protect the rights of the people. The Congress is part of the government thus established for this purpose.

This existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself. Moreover, the process whereby a change in the form of government can be accomplished has been prescribed by the people in the same document which records the establishment of the presently existing machinery, and that process requires the Congress to initiate proposed amendments. We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part, and inquiry into the desirability vel non of other forms of government is a power of Congress under its mandate to initiate amendments if such become advisable.

Moreover, Congress is charged with part of the responsibility imposed upon the federal government by that clause of the Constitution which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." Art. 4, Section 4. This clause alone would supply the authority for Congressional inquiry into potential threats to the republican form of the governments of the States.

If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to

the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject. Moreover, the accuracy of the information obtained depends in large part upon the knowledge and the attitude of the witness, whether present before the Committee or represented by the testimony of another. We note at this point that the arguments directed to the invalidity of this inquiry under the First Amendment would apply to an inquiry directed to another person as well as to one directed to the individual himself. The right to refuse self-incrimination is not involved. The problem relates to the power of inquiry into a matter which is not a violation of law.

The Congressional power of inquiry is not unrestricted. One obvious limitation upon this particular sort of inquiry is that some reasonable cause for concern must appear. We are referred to the "clear and present danger" rule expressed by Mr. Justice Holmes in *Schenck v. United States*³² and extending through the line of cases cited and discussed in *Bridges v. State of California*.³³ But all those cases dealt with statutes which actually imposed a restriction upon speech or publication. In our view, it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch of government to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when danger is clear and present, but the former is when danger is reasonably represented as potential.

There was justification here, within the bounds of the foregoing restriction, for the exercise of the power of inquiry. The President, pursuant to the constitutional requirement that "He shall from time to time give to the Congress Information of the State of the Union" (Art. II, Sec. 3), has announced to the Congress the conclusion that aggressive tendencies of totalitarian regimes imposed on free peoples threaten the security of the United States, and he mentioned the activities of Communists in that connection. That proposition underlies much of the current foreign policy of the Government.³⁴ It is also

³² 1919, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, 473.

³³ 1941, 314 U. S. 252, 62 S. Ct. 190, 86 L. ed. 192, 159 A. L. R. 1346; see also *Thomas v. Collins*, 1945, 323 U. S. 516, 530, 65 S. Ct. 315, 89 L. ed. 430.

³⁴ Speeches of Secretary of State George C. Marshall, at Harvard University on June 5, 1947, *N. Y. Times*, June 6, 1947, p. 2; at the General

the premise upon which much important legislation is now pending. These culminations of responsible governmental consideration sufficiently demonstrate the necessity for Congressional knowledge of the subject and so justify its course in inquiring into it.

Moreover, that the governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the Federal Constitution and guaranteed by it to the States, is explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject. In fact, the recitations in the opinion of the Supreme Court in *Schneiderman v. United States*, 1943, 320 U. S. 118, 63 S. Ct. 1333, 87 L. ed. 1796, are sufficient to justify inquiry. To remain uninformed upon a subject thus represented would be a failure in Congressional responsibility.

The next phase of the problem is whether the power of inquiry was validly delegated by the Congress to the Committee.

It is said that the Resolution is too vague to be valid. Perhaps the one phrase "un-American propaganda activities," taken alone as it appears in subclause (i) of the Resolution, would be subject to that condemnation. But the clause, above-quoted, "subversive and un-American propaganda that * * * attacks the principle of the form of government as guaranteed by our Constitution," which is subclause (ii), is definite enough. It conveys a clear meaning, and that is all that is required. The principles which underlie the form of the existing government in this country are well-enough defined in basic documents preceding the Constitution, are obvious in the undebated unanimity which prevailed on many basic propositions in the Convention of 1787, were stated during the consideration of the adoption of the Constitution, are stated in countless scholarly works upon principles of government, and indeed, are taught even to high school students in our schools. Aliens seeking naturalization are required to swear that they are "attached to the principles of the Constitution of the United States." 8 U. S. C. A. § 732 (a) (17). If the part of the Resolution involved in the instant case be clear and certain, it is of no importance that another part, not here involved, is vague or uncertain.

Appellants argue that because the Resolution is not on its face directly and exclusively concerned with such activities as may be constitutionally restricted, it is unconstitutional.

Assembly of the United Nations on Sept. 17, 1947, N. Y. Times, Sept. 18, 1947, p. 3; at Chicago, Ill., on Nov. 18, 1947, N. Y. Times, Nov. 19, 1947, p. 8; of Under Secretary of State Dean Acheson, at Middletown, Conn., on June 15, 1947, N. Y. Times, June 16, 1947, pp. 1, 3 (not in whole text).

Cases are cited to the point, but they are all criminal cases and dealt with the requirements in penal statutes. There is a difference between the particularity required in the specification of a criminal act and that required in the authorization of an investigation, as a comparative examination of the cases cited by appellants and the cases dealing with investigations, above mentioned, readily shows.

Appellants say that the vagueness of the Resolution made it impossible for them to determine with precision whether they could or could not lawfully refuse to answer questions which might be asked them. They say that they were liable for contempt only if they refused to answer a pertinent question and, therefore, had a right to know with precision what was pertinent, lest they unwittingly commit an offense. But pertinency relates to the particular question asked and not to unasked possibilities, and we have said enough to show that the question addressed to these appellants was pertinent to the subject described in the above-quoted sub-clause of the Resolution. The Supreme Court held in the *Sinclair* case³⁵ that the facts there sought were pertinent as a matter of law and that "He [the accused] was bound rightly to construe the statute." Here, as in that case, "There was no misapprehension as to what was called for."

It is vigorously pressed upon us that the whole gamut of the rights of minorities to freedom of thought is involved in this case. The answer to that insistence is the simple fact that we are here considering a specific inquiry. The general question of minority rights is not here, and we will not generalize. We do not have before us the question of how much or how little a Congressional Committee can ask of a private citizen. Minorities are infinite in nature. Activity is different from thought. Any attempt to generalize that all minority right to thought or activity outweighs all public interest, or vice versa, would be impossible and the result unsound; at the least, it would be judicial obiter. Moreover, there is no such rule without exception. As thought and activity differ among minorities, so may their relative weight with the public interest differ. None of the fundamental rights is absolute; the public interest may under some circumstances outweigh even the right to life itself. It is so in respect to the right to freedom of speech. We are considering a specific question only, which is whether this Congressional Committee may inquire whether an individual is or is not a believer in Communism or a member of the Communist Party. The answer depends upon the present nature of Communism and the Communist Party and its position in world and domestic affairs, as respectably indicated to the

³⁵ *Sinclair v. United States*, 1929, 279 U. S. 263, 299, 49 S. Ct. 268, 274, 73 L. ed. 692.

Congress. We are not here concerned with general rights or general powers.

Appellants argue that since an answer that the witness is a Communist would subject him to embarrassment and damage, the asking of the question is an unconstitutional burden upon free speech. It is no doubt true that public revelation at the present time of Communist belief and activity on the part of an individual would result in embarrassment and damage. This result would not occur because of the Congressional act itself; that is, the Congress is not imposing a liability, or attaching by direct enactment a stigma. The result would flow from the current unpopularity of the revealed belief and activity. Contra, it is suggested that since the pressure of unpopularity affects only sensitive or timid people, there need be less concern, on the theory that democratic processes must necessarily contemplate rugged courage on the part of those who hold convictions, or even beliefs on government. But it is true, realistically, that even one equipped to formulate a personal preference for a system of government at odds in basic respects with that presently existing, may be deterred from his conclusion by fear of, or distaste for, the unpopularity attached to it. We proceed upon the theory that even the most timid and sensitive cannot be unconstitutionally restrained in the freedom of his thought. But this consideration does not solve the problem, because the problem is the relative necessity of the public interest as against the private rights. Even assuming private rights of the timid to be of the fullest weight, the problem remains whether they outweigh the public necessities in this matter.³⁶ That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer. That invasion should never occur except upon necessity, but unless democratic government (by which we mean government premised upon individual human rights) can protect itself by means commensurate with danger, it is doomed. That it cannot do so is the hope of its opponents, the query of its skeptics, the fear of its

³⁶ Other requirements having similar restrictive effects upon the less hardy have been sustained in the public interest. For example, newspapers are required to publish their ownership, and to reveal the sources of their income to governmental inspection. An interesting light upon these contentions is cast by the history of our method of elections. The right of a qualified citizen to vote as he pleases is certainly a fundamental right and is a basic concept in our system of government. Public voting subjected even the most hardy to pressure and also to violence. But it was never thought, or suggested, that public voting violated constitutional rights. The secret ballot does not seem to have appeared in this country until February, 1888, when the newly-devised Australian system was adopted for municipal elections in Louisville, Kentucky. On this subject see Wigmore's *Australian Ballot System*.

supporters. While we will not give less consideration to the private rights involved because they may be those of the more sensitive or less courageous, on the other hand we cannot say that merely because those affected are of less courage or greater sensitivity than the average, therefore the public interest must be waived or given less consideration.

It is urged by the appellee Government that freedom of speech does not encompass freedom to remain silent. There is justification for the contention that the latter is a freedom of privacy, different in characteristics and governed by different considerations from the constitutionally protected freedom of speech. At least, the basic public policies which underlie the two are different. The public policy which supports freedom of speech is that the safety of democratic government lies in open discussion—discussion of grievances, remedies, of “noxious doctrine” as well as of popular preferences. The public interest in privacy, however, is premised upon the individual’s right to the pursuit of happiness. But we do not consider that question and do not rest this decision in any respect upon it. We assume, without deciding, for purposes of this case, that compulsion to answer the question asked by the Congressional Committee would impinge upon speech and not merely invade privacy.

Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views.³⁷

* * * The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. “It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”³⁸ The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused “affords no ground for denying the power.”³⁹ The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammelled freedom of legislative and

³⁷ E. g., Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193 (1947); Letter to the President by Members of Yale Faculty of Law, 34 A. B. A. J. 15, 16 (1948).

³⁸ Mr. Justice Frankfurter, concurring in *United States v. Lovett*, 1946, 328 U. S. 303, 319, 66 S. Ct. 1073, 1080, 90 L. ed. 1252, quoting Mr. Justice Holmes in *Missouri, K. & T. Ry. of Texas v. May*, 1904, 194 U. S. 267, 270, 24 S. Ct. 638, 48 L. ed. 971, 973.

³⁹ *McGrain v. Daugherty*, 273 U. S. at page 175, 47 S. Ct. at page 329.

administrative activity, within the respective powers of the legislature and the executive.

We hold that in view of the representations to the Congress as to the nature, purposes and program of Communism and the Communist Party, and in view of the legislation proposed, pending and possible in respect to or premised upon that subject, and in view of the involvement of that subject in the foreign policy of the Government, Congress has power to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party. And we further hold that the provision we have quoted from House Resolution No. 5 is sufficiently clear, definite and authoritative to permit this particular Committee to make that particular inquiry. We hold no more than that.

* * *

Appellants' next point is that the trial court erred in refusing to admit evidence which they say tended to prove that the House Committee used its investigatory power in a politically discriminatory manner, and that the administration of the Resolution resulted in an illegal discrimination which amounted to an unequal protection of the laws. The evidence tendered would have shown, appellants say, that the Committee treated in different fashion other persons such as Fascists, conservatives, reactionaries, and certain named individuals. We find no error in this ruling of the trial court. The mere attitude of the Committee is not for the Court, and the fact that the Committee chose not, or chose not at the time, to inquire into other matters is not pertinent to the validity of its inquiry into this one. Classification is permitted even in statutes, and surely Congress had a broad power of selectivity in its investigations. The issue presented upon the trial in the present case was specific. At the very least, to support a claim of discrimination, evidence would have to be tendered that the other matters mentioned were equally as pertinent to the subject of the Resolution as was the subject, and that the Committee clearly and intentionally forbore from inquiry there to the detriment of appellants. * * *

EDGERTON, Associate Justice (dissenting).

In my opinion the House Committee's investigation abridges freedom of speech and inflicts punishment without trial; and the statute the appellants are convicted of violating provides no ascertainable standard of guilt. It follows that the convictions should be reversed on constitutional grounds.

I

The First Amendment forbids Congress to make any law "abridging the freedom of speech, or of the press." If this "is to mean anything, it must restrict powers which are * * *

granted by the Constitution to Congress."⁴⁰ Legislation abridging the freedoms guaranteed by the First Amendment is not made valid by the fact that it would be valid if it did not abridge them.

The Murdock, Opelika, and Busey cases make this plain. Clear and necessary as the taxing power is, it does not extend to sales of propaganda not made for profit; a license tax, although imposed for the legitimate purpose of raising revenue, is unconstitutional in its application to such sales.⁴¹ And this is true even if "it has not been proved that the burden of the tax is a substantial clog" on the circulation of propaganda;⁴² "it may not be said that proof is lacking that these license taxes * * * are likely to restrict petitioners' * * * activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment. * * * A community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."⁴³

The Murdock and Opelika cases dealt with municipal legislation. The First Amendment applied only indirectly, by way of the due process clause of the Fourteenth Amendment. Here, as in the Busey case, it applies directly.

It was not the weakness of the taxing power but the strength of the First Amendment that made the Murdock and Opelika taxes unconstitutional. Yet this court now holds that the First Amendment, which restricts the express power of taxation, does not restrict the implied power of investigation. Investigation in general, and this investigation in particular, is not more necessary than taxation. There is no basis in authority, policy, or logic for holding that it is entitled to a preferred constitutional position. "Freedoms of speech, press, and religion are entitled to a preferred constitutional position." The power of investigation, like the power of taxation, stops short of restricting the freedoms protected by the First Amendment.

⁴⁰ Chafee, *Free Speech in the United States*, 30-31.

⁴¹ *Jones v. City of Opelika*, 319 U. S. 103, 63 S. Ct. 890, 87 L. ed. 1290; *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 875, 87 L. ed. 1292, 146 A. L. R. 81; *Busey v. District of Columbia*, *infra*, note 5.

⁴² *Jones v. City of Opelika*, 316 U. S. 584, 604, 62 S. Ct. 1231, 1242, 86 L. ed. 1691, 141 A. L. R. 514. The dissent of Chief Justice Stone here quoted, and the other dissents filed at the same time, were afterwards adopted as opinions of the Court. *Jones v. City of Opelika*, 319 U. S. 103, 104, 63 S. Ct. 890, 87 L. ed. 1290.

⁴³ *Murdock v. Commonwealth of Pennsylvania*, *supra*, note 2, 319 U. S. at pages 114, 116, 63 S. Ct. at pages 875, 876.

Quite as clearly as the taxes in the *Murdock*, *Opelika*, and *Busey* cases, the House Committee's investigation is on its "face * * * a restriction of the free exercise of those freedoms." It actually restricts them and puts a substantial clog upon them. It is therefore more clearly unconstitutional than the taxes.

The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.

The investigation also restricts freedom of speech by forcing people to express views. Freedom of speech is freedom in respect to speech and includes freedom not to speak. "To force an American citizen publicly to profess any statement of belief" is to violate the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." That is the rule of the *Barnette* case⁴⁴ which involved pressure on school children to profess approved beliefs. Witnesses before the House Committee are under pressure to profess approved beliefs. They cannot express others without exposing themselves to disastrous consequences. Yet if they have previously expressed others they cannot creditably or credibly profess those that are approved. If they decline "publicly to profess any statement of belief" they invite punishment for contempt. The privilege of choosing between speech that means ostracism and speech that means perjury is not freedom of speech.

"Under our traditions beliefs are personal and not a matter of mere association." Yet the House Committee attributes unpopular and "communistic" beliefs to persons and groups on the basis of mere association with other persons and groups.⁴⁵

⁴⁴ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 634, 642, 63 S. Ct. 1178, 87 L. ed. 1628, 147 A. L. R. 674.

⁴⁵ "It would seem that involuntary affirmation would be commanded only on even more immediate and urgent grounds than silence." 319 U. S., page 633, 63 S. Ct., page 1183.

⁴⁶ Robert E. Cushman, Goldwin Smith Professor of Government in Cornell University, has said: "Under the guise of attacking Communism [Mr. Dies] was able to attack all so-called liberal ideas in the field of politics and economics. This was done by pinning the label of Communism on all persons who belonged to any society or organization in which there

By this device it greatly extends the restraining effect of its investigation. Its treatment of the Southern Conference for Human Welfare illustrates its practice. It further extends the restraining effect of its investigation by stigmatizing a remarkably wide range of beliefs as un-American.⁴⁶

That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure.⁴⁷ But nothing turns on this question of fact. The views of timid people are not necessarily worthless to society. No one needs self-expression more. The Constitution protects them as it protects others. If it be true that the Committee's investigation would not restrain a determined man, this matters no more than the fact that the taxes in the *Murdock* and *Opelika* cases would not restrain a rich man. Some people speak freely whatever it costs, but this does not mean that speech is free whatever it costs.

This court is ruling that although restraint results from the Committee's investigation it is not forbidden by the Constitution. But the mere fact that restraint is likely to result from the investigation is more than enough to bring it within the condemnation of the *Murdock* and *Opelika* cases.

ever had been any Communist member, or any idea, theory, or action of which any Communist had ever approved." Civil Liberty and Public Opinion; in *Safeguarding Civil Liberty Today*, Bernays lectures of 1944 at Cornell University 81, 100.

⁴⁶ *Infra* at note [26]. Professor Cushman says: "The opprobrious epithet 'un-American' was applied to all those who indulged in any open criticism of our existing institutions, our so-called American way of life, or of Mr. Dies. * * * Good loyal American citizens who ought to know better were persuaded to give their support to the suppression of free speech and free press on the grotesque theory that they were thereby showing their loyalty to the basic principles of American democracy. Bigotry was made not merely respectable but noble. By the skillful use of labels, or slogans, American public opinion was inoculated with the dangerous idea that true Americanism consists in the stalwart defense of the status quo and the suppression of those dangerous and disloyal people who are unpatriotic enough to want to criticize it or suggest any change in it." *Op. cit. supra* note 13, at 100.

⁴⁷ Even in 1943, after less than five years of existence, the Committee had accumulated a file of over 1,000,000 cards containing information on individuals and organizations. H. Rep. No. 2748, 77th Cong., 2d Sess., 2 (1943).

The case is stronger than *Murdock* and *Opelika* not only because the investigation actually and greatly restrains speech but in other respects as well. In the *Murdock* and *Opelika* cases there was no purpose to restrain and no singling out of propaganda for special treatment. License taxes on sales, imposed in general terms and for the legitimate purpose of raising revenue, were unconstitutional in failing to exempt sales of propaganda not made for profit. The mere incidental inclusion of propaganda among activities burdened only incidentally to a proper legislative purpose was bad. But in the present case neither the inclusion nor the burdening of propaganda is incidental. The House Committee's enabling Act concerns, specifically and exclusively, "propaganda activities," and the Committee's principal purpose is to restrain them. Its purpose is shown clearly by its acts and conclusively by its statements. The Committee and its members have repeatedly said in terms or in effect that its main purpose is to do by exposure and publicity what it believes may not validly be done by legislation.⁴⁸ This is as

⁴⁸ When the House of Representatives first authorized the Committee as a special committee Mr. Dies, its first chairman, said "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon we have in our possession." 83 Cong. Rec. 7570 (1938). Some years later Mr. Mundt said: "The country might as well be told first as last that our committee is in this fight to expose un-American activities to the finish. By your votes today we ask you to give evidence of your support." 92 Cong. Rec. 3767 (1946). Mr. Rankin has said, in the present record, that the Committee is a "grand jury" to which "defense counsel" should not be admitted. See also 91 Cong. Rec. 275 (1945).

The Committee's Reports declare its purpose. "While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities." H. Rep. No. 2, 76th Cong. 1st Sess., 13 (1939). " * * * Investigation to inform the American people * * * is the real purpose of the House Committee. * * * The committee conceives its principal task to have been the revelation of the attempts now being made by extreme groups in this country to deceive the great mass of earnest and devoted American citizens. * * * The purpose of this committee is the task of protecting our constitutional democracy by * * * pitiless publicity. * * * " H. Rep. No. 1476, 76th Cong., 3d Sess., 1, 3, 24, (1940). "This committee is the only agency of Government that has the power of exposure. * * * There are many phases of un-American activities that can not be reached by legislation or administrative action." H. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941). The Committee is "empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future." H. Rep. No. 2742, 79th Cong., 2d Sess., 16 (1947). The Committee regards discovery and exposure as its "special function" by mandate from the House. H. Rep. No. 2748, 77th Cong., 2d Sess., 2 (1943). Accordingly it made public the names, positions, and salaries of some 563 government employees as members of the American League for Peace and Democracy. "The committee felt that the Congress and the people were entitled to know who they were." *Ibid.*, pp. 4-5.

Chairman Thomas recently said in a radio address: "The chief function

much as to say that its purpose is to punish or burden propaganda. * * *

What Congress may not restrain, Congress may not restrain by exposure and obloquy. If it be thought that the Committee's purpose does not include "punishment in the ordinary sense," this is immaterial to the present point. The First Amendment forbids Congress purposely to burden forms of expression that it may not punish.

It is said that Congress may punish propaganda that advocates overthrow of the government by force or violence; that it may therefore investigate to determine whether such legislation is necessary; and that it may do this even if the investigation burdens such propaganda and is intended to do so. In short, it is said that the House Committee's investigation is a necessary means to a constitutional end and is therefore constitutional. To this there are at least three answers.

(1) Investigation of possible need for legislation making it unlawful to advocate overthrow of the government by force or violence has not been necessary and has not been among the purposes of Congress or of the House Committee at any time since 1940. On the contrary, the broadest possible legislation of that sort was passed in that year and is still on the books.⁴⁹

(2) The Committee's enabling Act says nothing about force or violence or overthrow of the government. It is broad enough to include investigation of propaganda advocating such things, but it is not by any means limited to such propaganda, and neither is the Committee's actual investigation. Though the Committee has concerned itself largely with communism, and formerly with fascism, it has also concerned itself with propa-

of the committee, however, has always been the exposure of un-American activities. This is based upon the conviction that the American public will not tolerate efforts to subvert or destroy the American system of government, once such efforts have been pointed out. The Congress' right to investigate and expose undemocratic forces is as established and untrammelled as our Constitution." Cong. Rec., 80th Cong., 1st Sess., A4606 (Nov. 20, 1947).

⁴⁹ The so-called Alien Registration Act of 1940 contains provisions having nothing to do with registration and not limited to aliens, but applicable to all persons, that make it "unlawful for any person—(1) to knowingly or willfully advocate, abet, advise, or teach, the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof." 54 Stat. 671, § 2(a), 18 U. S. C. A. § 10.

ganda unrelated to any possible overthrow of the government by force and plainly beyond any power of Congress to burden or restrain. "In the course of its inquiries such diverse groups have come under its scrutiny as the American Civil Liberties Union, the C. I. O., the National Catholic Welfare Conference, * * * the Farmer-Labor party, sit-down strikes, the Federal Theatre Project, consumers' organizations, * * * the magazine Time." Among various "other criteria which the Committee or its agents have from time to time suggested as indicative of activity within the scope of its inquiries are: opposition to 'the American system of checks and balances,' opposition to the protection of property rights, belief in dictatorship, opposition to the Franco government of Spain, opposition to General MacArthur, advocacy of a world state, advocacy of the dissolution of the British Empire, criticism of members of Congress, and criticism of the Committee on Un-American Activities."⁵⁰ Obviously there could be no necessity for many of the Committee's activities, and no excuse for the restraints they impose, even if the Act of 1940 were not on the books.

Legislative action that restrains constitutionally protected speech along with other speech cannot be enforced against either. Legislation is unconstitutional as a whole if it "does not aim specifically at evils within the allowable area of state control but * * * sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute * * * results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. * * * An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. * * * Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evi-

⁵⁰ The Committee has also scrutinized, e. g., radio commentators who have changed their names or who "can hardly speak English," and Army orientation material which "sought to teach that any person who claimed to be any one or all of the following was a Fascist, or was likely to become a Fascist very shortly: '100 percent American, anti-Jew, and anti-Negro, anti-labor, anti-foreign-born, anti-Catholic.'" H. Rep. No. 2233, 79th Cong., 2d Sess., 9-13, 14 (1946).

The Committee said in its first Report: "* * * (5) Any organization or individual who believes in or advocates a system of political, economic, or social regimentation based upon a planned economy is un-American. (6) Any organization or individual who believes in or advocates the destruction of the American system of checks and balances with its three independent coordinate branches of government is un-American." H. Rep. No. 2, 76th Cong., 1st Sess., 12 (1939).

dence under it, which prescribes the limits of permissible conduct and warns against transgression."⁵¹

Even if the views the House Committee sought to elicit from these appellants had been of a sort that Congress might properly restrain, by investigative or other action aimed specifically at such views, the appealed convictions would have to be reversed. "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government * * *."⁵²

(3) The problem is not, as the court suggests, that of balancing public or social interests against private interests. "The principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. * * * Imprisonment of 'half-baked' agitators for 'foolish talk' may often discourage wise men from publishing valuable criticism of government policies. * * * The great interest in free speech should be sacrificed only when the interest in public safety is really imperiled. * * * The American policy is to meet force by force, and talk by talk."⁵³

This policy is embodied in American constitutional law. "The penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."⁵⁴ "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"⁵⁵ "danger of action of a kind the State is empowered to prevent and punish."⁵⁶

There is no evidence in the record that propaganda has created danger, clear and present or obscure and remote, that the government of the United States or any government in the United States will be overthrown by force or violence. "When legis-

⁵¹ *Thornhill v. State of Alabama*, 310 U. S. 88, 97-98, 60 S. Ct. 736, 742, 84 L. Ed. 1093. Cf. *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 523, 46 S. Ct. 619, 70 L. ed. 1059.

⁵² *Herndon v. Lowry*, 301 U. S. 242, 263, 57 S. Ct. 732, 742, 81 L. ed. 1066. The Court continued: "if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others." The present statute contains no such qualification, either on its face or as construed and applied.

⁵³ Chafee, *op. cit. supra* note 1, at 35 ix, 180.

⁵⁴ *Herndon v. Lowry*, 310 U. S. at page 258, 57 S. Ct. at page 739.

⁵⁵ *Schenck v. United States*, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470.

⁵⁶ *West Virginia State Board of Education v. Barnette*, *supra* note [44] 319 U. S. at page 633, 63 S. Ct. at page 1183, 87 L. ed. 1628, 147 A. L. R. 674. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges v. State of California*, 314 U. S. 252, 263, 62 S. Ct. 190, 194, 86 L. ed. 192, 159 A. L. R. 1346.

lation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed * * *.”⁵⁷ “The usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, and indispensable democratic freedoms secured by the First Amendment.”⁵⁸

The court asks “How, except upon inquiry, would the Congress know whether the danger is clear and present?” The context shows that this means “How, except upon congressional inquiry * * *?” The answer is: through the Department of Justice, whose duty it is, if clear and present danger can be discovered, to enforce the law of 1940 which makes it a crime to advocate overthrow of the government by force; through the intelligence services; and through any new agency that Congress may think it useful to create. As the House Committee’s history shows, no dangerous propaganda that eludes other agencies is likely to be discovered by a congressional inquiry. But a congressional inquiry, however superfluous, to discover whether there is clear and present danger, could be authorized and could be conducted without violating the First Amendment. The premise that the government must have power to protect itself by discovering whether it is in clear and present danger of overthrow by violence is sound. But it does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world, on topics ranging from communism, however remotely and peaceably achieved, to the “American system of checks and balances,” the British Empire, and the Franco government of Spain. Since the premise does not support this conclusion it has nothing to do with this case. It justifies no punitive exposure. It justifies a very different investigation from the one the House Committee conducts. The investigation the Committee conducts is unsupported by any color of necessity. As the fact that some taxation is necessary does not validate everything done in the name of taxation, the fact that some investigation is necessary does not validate everything done in the name of investigation. So far from being necessary to the safety of the government, the Committee’s investigation weakens the government by effectively warning the unorthodox, some of whom are conspicuous for ability and patriotism, to avoid government service.

The free speech point comes to this. Congressional action that is either intended or likely to restrict expression of opinion that Congress may not prohibit violates the First Amendment.

⁵⁷ *Busey v. District of Columbia*, 78 U. S. App. D. C. at page 192, 138 F. 2d 595.

⁵⁸ *Thomas v. Collins*, 323 U. S. 516, 529-530, 65 S. Ct. 315, 322, 89 L. ed. 480. * * *

Congressional action in the nature of investigation is no exception. Civil liberties may not be abridged in order to determine whether they should be abridged. The House Committee's investigation is both intended and likely to restrict expression of opinion that Congress may not prohibit. That it actually does so is clear and undisputed. If all this were otherwise the investigation might perhaps be within legislative power. But that is immaterial, like the fact that a tax restricting non-profit sales of propaganda, or intended to restrict circulation of newspapers, would be within legislative power if it had no such effect or purpose.

Congress has ratified the Committee's course by renewing its appropriations and extending its life. However, the question is whether the Committee's investigation is constitutional, not whether it is authorized as between the Committee and Congress. Since Congress could not authorize it, whether or when Congress intended to do so is immaterial. "In passing upon constitutional questions * * * the statute must be tested by its operation and effect."⁵⁹ The case is as if the enabling Act read "The Committee shall expose unorthodox propaganda in order to restrain and punish it." The issue is whether Americans may be fined and imprisoned for passive resistance to this inquest into their political and economic views. No one denies that the inquest is an effective instrument of restraint. I hope the last word has not been said on the question whether it is a legal one.

II

"An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution."⁶⁰ "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."⁶¹ A punitive statute is no better if it creates the offense, or authorizes a committee to create it; delegates to the committee the ascertainment of individuals to be punished and the infliction of punishment; provides no standard of guilt; compels the individual, in the committee's discretion, to testify against himself; deprives him of the right to testify in his own defense; and deprives him also of the right to counsel, the right to call witnesses, and the right to cross-examine opposing witnesses. The House Committee's enabling Act, as the Committee has construed and applied it, does all that.

⁵⁹ *Near v. Minnesota ex rel. Olson*, 283 U. S. at page 708, 51 S. Ct. at page 628, 75 L. ed. 1357.

⁶⁰ *Kilbourne v. Thompson*, 103 U. S. at page 182, 26 L. ed. 377.

⁶¹ *United States v. Lovett*, 328 U. S. 303, 315-316, 66 S. Ct. 1073, 1079, 90 L. ed. 1252.

Punishment is harm intentionally inflicted because of conduct. Intentionally inflicted loss of employment is punishment, as the Court held in the Lovett case. Sometimes, as in that case, the Committee intentionally inflicts dismissal from employment. It intentionally and directly inflicts publicity and opprobrium. That these may be damaging is both obvious and recognized by law, including the law of libel. Publicity and opprobrium that are intended as an "effective weapon" against activities that cannot be reached by legislation are intended to inflict damage. They are damaging in fact as well as intention. The Court implied in the Lovett case that no "congressional action, aimed at * * * named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living" can be sustained. The Committee takes such action. Even courts to which the Constitution entrusted the function of punishment, "were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself * * *."⁶² The Committee inflicts punishment for unorthodox opinions or associations without any of these safeguards. To say that it may do so because it is not a court is to say that many vital constitutional rights may be denied because another and a most vital one is also denied.

III

"Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. * * * Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." On these grounds the Supreme Court, in the recent Musser case, vacated a conviction under a Utah statute punishing conspiracy "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws * * *." Unlimited by its context or by judicial construction, the Court found this statute so indefinite as to cover "agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order."

⁶² United States v. Lovett, 328 U. S. at pages 314, 317, 90 L. ed. 1252. 63 S. Ct. 1078, 1080.

Since such notions are highly various, the statute is too vague to support a criminal conviction.

It would be hard to find a clearer instance of this principle than the one before us. The Act under which appellants were convicted makes it a misdemeanor to fail to produce papers "upon any matter under inquiry" before a congressional committee or refuse to answer any question "pertinent to the question under inquiry."⁶³ "A witness rightfully may refuse to answer where * * * the questions are not pertinent to the matter under inquiry."⁶⁴ The matter under inquiry before the House Committee is thus described in its enabling Act and in earlier resolutions: "(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."⁶⁵ Under each of these three clauses, the matter under inquiry is limited by the term "un-American." If that term is so indefinite as to cover "almost any act which a judge and jury [or the Committee] might find at the moment contrary to his or its notions of what was good * * *" the Musser case requires reversal of the present convictions. For then the matter under inquiry is similarly indefinite; a witness before the committee cannot know whether a question or demand is "pertinent to the matter under inquiry"; and he cannot know whether or not he will be committing a crime if he fails to respond.

The term un-American is completely indefinite. Government counsel do not attempt to define it and concede that they cannot define it. In effect, though not in purpose, they thereby confess error.

In a literal sense whatever occurs in America is American. The President's Advisory Committee on Universal Training, in response to the contention that universal military training was un-American, said "An epithet is not an argument. 'Un-American' means simply that it has not been done before in America."⁶⁶ But obviously Congress employed a different usage, and meant the term un-American to connote some propaganda that does occur in America. Just as obviously Congress did not mean it to cover all propaganda that occurs here, including e. g. the

⁶³ 44 R. S. § 102, 52 Stat. 942, 2 U. S. C. A. 192.

⁶⁴ *McGrain v. Daugherty*, 273 U. S. 135, 176, 47 S. Ct. 319, 329, 71 L. ed. 580, 50 A. L. R. 1.

⁶⁵ 60 Stat. 828. Italics supplied.

⁶⁶ Program for National Security, Report of the President's Advisory Committee on Universal Training (1947) 39.

usual campaign literature of the major parties. The question is, what line did Congress draw? Congress drew none.

Once the literal sense, which Congress plainly did not intend, is left behind, the term un-American is one of the vaguest in the language. It may suggest what is not customary or popular here. But different persons have very different ideas of what is not customary or popular. It seems probable that Congress used the term in some undisclosed sense that includes only some unidentified part of this field and is therefore even more indefinite. The House Committee may perhaps be said to have interpreted the term in practice as including, though not always limited to (1) "communistic" (and, formerly, "fascistic") ideas, (2) ideas commonly called radical, and (3) ideas commonly called liberal. The Committee's practice has made this usage somewhat familiar. But in a different usage that is at least as familiar the term un-American includes, without being limited to, ideas commonly called undemocratic. And even if it were conceded that Congress intended the suggested interpretation of the Committee's interpretation, the term un-American would still be too vague for criminal purposes because (a) nothing in the enabling Act informs the public that such an interpretation is intended, (b) the words communistic, fascistic, radical, and liberal are themselves too vague for criminal purposes, and (c) the suggested interpretation is not limited to those words.

This does not begin to exhaust the ordinary varieties of usage of the term un-American. Since some connotation of odium is common to most of them, "un-American propaganda" might perhaps be said to mean "odious propaganda." But this again would not do for criminal purposes. Witnesses before the Committee cannot be required to decide whether or not demanded evidence relates to propaganda that is odious, on pain of criminal punishment if they think it does not and a court thinks it does. And the basic question, whether demanded evidence relates to propaganda that is un-American, is vaguer still, since the answer depends not only upon applying but also upon selecting one of the vague and various meanings of un-American.

The enabling Act uses the word "subversive," the word "attacks," and the words "the principle of the form of government as guaranteed by our Constitution," but it uses none of them independently of the word un-American. Moreover, the quoted words themselves have no reasonably clear meaning. Does "the principle of the form of government" here mean the republican or democratic principle only, or does it include e. g. the constitutional duty of courts not to enforce unconstitutional legislation? This court puts a plural where Congress put a singular, and says "the principles * * * are obvious." To me it is not obvious how much Congress meant by "the principle,"

or how much the court means by "the principles," or that the two meanings are identical. Both because "the principle" is vague and because "attacks" is vague, I do not know whether propaganda "attacks the principle" if, e. g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy. Neither do I know whether the kind of propaganda with which the House Committee undertook to connect the appellants through their records "attacks the principle." A member of the Communist Party who advocates sweeping constitutional changes may, in the Supreme Court's view, be "attached to the principles of the Constitution" within the meaning of those words in a naturalization act: "As Justice Holmes said: 'Surely it cannot show lack of attachment to the principles of the Constitution that * * * [one] thinks that it can be improved. * * * If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.'"⁶⁷ But we do not know that Congress intended the House Committee's enabling Act to be interpreted in accordance with that view. The Committee interprets it differently.

Apparently Congress did not even intend to give the Committee a definite function. "The purpose seems to have been to give the Committee a roving commission to inquire into any propaganda activities which a majority of the Committee thought warranted investigation." At all events the statutory language, like that held bad in the Musser case, covers "almost any act which a judge and jury [or the Committee] might find at the moment contrary to his or its notions of what was good * * *." A court might as well be asked to enforce "a statute which in terms merely penalized and punished all acts detrimental to the public interest * * *. So vague and indeterminate are the boundaries thus set to the freedom of speech * * * that the law necessarily violates the guarantees of liberty * * *."⁶⁸ In so ruling in the Herndon case the Court did not add: 'unless the defendant's act seems to the Court clearly on the penalized side of the vague and indeterminate boundaries.' I understand this court to hold that the Committee's demand for appellants' records was clearly within the limits, however vague, of the enabling Act, and that appellants are therefore punishable for not producing them. I have tried to show that the court's premise is erroneous. The

⁶⁷ *Schneiderman v. United States*, 320 U. S. 118, 138, 63 S. Ct. 1333, 1343, 87 L. ed. 1796. See also *supra* note 52.

⁶⁸ *Herndon v. Lowry*, *supra* note [52], 301 U. S. at pages 263, 264, 57 S. Ct. at pages 741, 742, 81 L. ed. 1066. Cf. *Thornhill v. State of Alabama*, *supra* note 51.

Musser and Herndon cases show that it does not support the court's conclusion.

IV

Appellants appeared and testified before the Committee but did not produce the demanded records. The court says "These appellants were not asked to state their political opinions. They were asked to account for funds." This distinction merely makes any possible pertinence to the Committee's investigation the more remote. The appellants were asked to account for funds in order to reveal their political opinions. Accordingly, the court says: "We are considering a specific question only, which is whether this Congressional Committee may inquire whether an individual is or is not a believer in Communism or a member of the Communist Party." That specific question is before us, if at all, as an aspect of the larger question whether courts may punish individuals for not responding to an inquiry by this Committee into their political opinions. My answer to both questions is no. The Committee's specific inquiry abridged appellants' freedom of speech and attempted to inflict punishment without trial. The Committee's entire investigation was unconstitutional both as abridging freedom of speech and as attempting to punish without trial; and there is no duty to respond to inquiries in an unconstitutional proceeding. The statute that appellants are convicted of violating provides no ascertainable standard of guilt.

I do not consider other alleged errors. Legislation restraining speech, which is excepted from the principle that constitutionality is presumed, should for similar reasons be excepted from the related principle that no ruling on constitutionality is made when a case can be decided on other grounds.^{68A}

NOTE

In view of the foregoing decisions, would it be your view that there are no limits to the scope of Congressional investigation? How, if at all, do the Josephson and Barsky cases affect the Court's views as thus summarized in the Sinclair case, 279 U. S. 263, 291-293 (1929):

"By our opinion in *McGrain v. Daugherty*, 273 U. S. 135, 173, 71 L. ed. 580, 47 S. Ct. 319, * * * two propositions are definitely laid down: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them and appropriate to make the express powers effective; and, the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional inter-

^{68A} For a later affirmation of the views of the majority in the Barsky case, see *Lawson v. United States* and *Trumbo v. United States*, U. S. Court of Appeals, District of Columbia, June 13, 1949.

pretation just stated is rightly applied. And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry.

* * *

In *Kilbourne v. Thompson*, 103 U. S. 168, this court, speaking through Mr. Justice Miller, said (p. 190): ‘* * * we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.’ And referring to the failure of the authorizing resolution there under consideration to state the purpose of the inquiry (p. 195): ‘Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By ‘fruitless’ we mean that it could result in no valid legislation on the subject to which the inquiry referred.’

In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 49, 14 S. Ct. 1125, Mr. Justice Harlan, speaking for the court said (p. 478): ‘We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. * * * We said in *Boyd v. United States*, 116 U. S. 616, 630, 29 L. ed. 746, 6 S. Ct. 524,—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of his life.’

Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 S. Ct. 115, illustrates the unwillingness of this court to construe an Act of Congress to authorize any examination of witnesses in respect of their personal affairs. And see *United States v. Louisville & Nashville R. Co.*, 236 U. S. 318, 335, 59 L. ed. 598, 35 S. Ct. 363.”

THE ISSUANCE OF SUBPOENAS

Problem E:

FURTHER EXCERPTS FROM "THE HUGHES INVESTIGATION"

The following excerpts from the Hughes investigation⁸⁹ pose some interesting problems concerning the power of Congressional committees to subpoena records:

Senator Ferguson. * * * I would like to talk to Mr. Dietrich [Executive vice-president, Hughes Tool Co.].

Mr. Slack. [Counsel, Hughes Tool Co.] There he is, Senator.

Senator Ferguson. Mr. Dietrich, on the 4th of this month, you were served with a subpoena, a subpoena duces tecum, to produce all the records, books of account, checkbooks, canceled checks, and bank statements relating to the personal bank account of Howard Hughes, now in your possession.

Up to date, they have not been given to the committee.

Mr. Dietrich. The committee has not asked for them, Senator.

Senator Ferguson. Well, you have a subpoena to bring them in.

Mr. Dietrich. All right. They would take a truck. Do you want the truck driven in here, or do you want them carried in?

Senator Ferguson. It does not make any difference how large the order, the subpoena reads and means just what it says, and we want them so that we can go over them before this hearing is concluded.

Mr. Dietrich. All right.

Senator Ferguson. We will send the committee truck; size does not concern the committee at all.

Mr. Dietrich. I am not questioning that; I questioned one thing, Senator, and that is this: Do I have the right—and I would like the privilege of consulting an attorney—to refuse to produce those on the ground that, first, they are not my records, they are Mr. Hughes' records. He is here. Why don't you serve the subpoena on Mr. Hughes?

Senator Ferguson. Because they are in the custody of you.

Mr. Dietrich. They are not in my custody.

Senator Ferguson. In your possession and custody.

Mr. Dietrich. They are not in my possession, and not in my custody and never have been.

* * *

Mr. Dietrich. * * * Mr. Hughes is here. If he will consent, it will solve the problem. Why don't you ask him?

Senator Ferguson. Mr. Hughes, do you or do you not consent? Your consent is not necessary.

⁸⁹ Hearings before a Special Committee Investigating the National Defense Program, U. S. Senate (1947), 80th Cong., 1st sess., pt. 40, pp. 24278-24284.

Mr. Hughes. May I interject into this for a minute? They are my records.

As I understand it, Senator, this is not of my definite knowledge, but I am told that you have served a subpoena on Mr. Dietrich for some records which are my property.

Now, in the first place, I think that that is subject to some legal doubt, because I don't see how Mr. Dietrich has the right to turn over something that does not belong to him. So, if you want the records, and since they are my property, why don't you ask me for them, and why don't you set forth in detail exactly what you want.

Senator Ferguson. Because, Mr. Hughes, under the law the papers were in the possession of Noah Dietrich, and therefore the law is clear that he is the man to be subpoenaed. The duces tecum takes the paper—requires him to bring them with him.

Now, if you insist, and this is not going to waive contempt on Dietrich's part, if you insist upon a subpoena, we will serve you, but this committee is not going to be passing on these contempt charges lightly, because they are going to perform their duties.

Senator Ferguson. When are you [Mr. Dietrich] going to produce the records to this committee room that you have been subpoenaed to produce?

Mr. Dietrich. I prefer to have you direct that to Mr. Hughes.

Senator Ferguson. No; I am asking you. The subpoena was served on you.

Mr. Dietrich. Then I would like to ask Mr. Slack whether or not I have a legal obligation to produce them under that subpoena, in view of the fact that they are not my records, they are not in my direct custody.

Senator Ferguson. All right. Confer with your counsel.

Mr. Hughes. That will take a little study, won't it?

Mr. Slack. I don't think so.

Mr. Hughes. Why don't you do this—

Senator Ferguson. The committee is not making deals.

Mr. Hughes. This is no deal. Why don't you just make a list of what you want?

Senator Ferguson. The committee has asked the question, and the man has said that he wanted to confer with counsel. I am giving him that opportunity to confer with counsel.

Mr. Hughes. I don't think he wants a 10-minute conference to decide a matter as complicated as this, because I understand there is considerable doubt about whether Mr. Dietrich has the right to deliver those records.

Mr. Slack. No doubt in my mind, Mr. Hughes, that he is not under any obligation to deliver your personal records

which are not in his possession, and over which he has no authority.

Mr. Hughes. That settles it right now.

Mr. Slack. If he should take possession of them contrary to your wishes, he would be invading your rights.

* * *

Senator Ferguson. Mr. Hughes, do you have these papers in your possession?

Mr. Hughes. I don't have them on my person, if that is what you mean.

Senator Ferguson. Now do not try to get smart with this committee, you know that was not the question.

Mr. Hughes. Well, Senator—

Senator Ferguson. We are not going to have any of that in this committee. You knew that was not the question. You know what "possession" is. We knew you didn't have them in your coat pocket.

Mr. Hughes. Senator, Senator, look; I am not a lawyer. I don't know exactly what possession means. But I do know those papers are my property.

Senator Ferguson. All right.

Mr. Hughes. And belong to me and I don't think Mr. Dietrich has a right to present them here; that is my opinion.

Senator Ferguson. Now, will you produce them at 2 o'clock, all of them?

Mr. Hughes. Senator, if you will give me a list in particular of what you want, I will consult with my attorney and will—

Senator Ferguson. Go ahead.

Mr. Hughes. And will determine whether or not in his opinion, they are relevant to this matter.

Senator Ferguson. Under that statement, there is nothing that this committee can do; if we knew what was in there, we would not have to conduct the investigation.

Mr. Dietrich. Your GAO auditors have a complete written list of every one of those documents.

Senator Ferguson. Just a minute. We want to bring in all of the papers that Dietrich brought up here or had sent up here.

Mr. Hughes. Senator—

Senator Ferguson. Under the circumstances, according to your statement, we will prepare a subpoena, and serve it now upon you.

Mr. Hughes. Mr. Chairman—

Senator Ferguson. Counsel, will you get me a subpoena? We are not going to argue with you at all.

Mr. Hughes. I don't want to argue with you.

Senator Ferguson. We will do this thing and we are going to require you to produce them.

Mr. Hughes. Mr. Chairman, do not make it appear that I am trying to conceal something since your auditors have looked at all of these papers and were given free access to them.

Senator Ferguson. But your answer was that you were not going to produce them until you conferred with your counsel.

Mr. Hughes. That is correct, because I don't want my papers spread all over the place here and half of them lost and I would like to know in particular what you want and then I will consult with my attorney and see if we feel they are relevant and if you have the right to subpoena them for this action.

Senator Ferguson. We want all of them, all of the papers that were brought here from Houston and all of the papers that you have here in Washington in relation to this matter.

Mr. Hughes. If you will state specifically what you want—

Senator Ferguson. No; we will not state, as I say. We cannot name the exact items.

Mr. Hughes. Why can't you?

Senator Ferguson. We can't name the check—

Mr. Hughes. Your auditors have looked at all of them, your auditors have been through all of these papers.

Senator Ferguson. We will not argue with you.

We will now go to some other items while the subpoena is being prepared.

* * *

1. Must the Committee in its subpoena specify in detail those papers which "are relevant in this matter," or may it lawfully ask merely for "all of the papers that were brought here from Houston and all of the papers that you have here in Washington in relation to this matter." Does this constitute an unwarranted "fishing expedition" which is outlawed by the Fourth Amendment?

2. May it be argued that some of the records demanded may well incriminate the corporation, and that the Fifth Amendment protects the corporation against such disclosure?

3. If the records were in Dietrich's custody, may Hughes obtain a restraining order to prevent Dietrich from surrendering them to the committee, on the ground that the committee is engaged in a "fishing expedition"? If the records came into the custody of the committee, may it be restrained from making them public on the grounds that they are not relevant, and will damage the corporation by revealing valuable information to its competitors?

Consider the following materials as they relate to these problems:

CASE MATERIALS

OKLAHOMA PRESS PUBLISHING CO. v. WALLING⁷⁰

Supreme Court of the United States, 1946,
327 U. S. 186, 90 L. ed. 614, 66 S. Ct. 494

[Walling, the Administrator of the Wage and Hour Division of the Department of Labor, issued a subpoena duces tecum, pursuant to statutory authority, to obtain access to certain documents and records of the plaintiff newspaper in order to determine whether there was any evidence to justify issuing a charge of violation of the Fair Labor Standards Act. The Act provides for the judicial enforcement of the subpoena. In issue among other things, was whether there was a contravention of the "self-incrimination" provision of the Fifth Amendment, and the "search and seizure" provision of the Fourth.]

Mr. Justice RUTLEDGE. * * * Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted here only raises the ghost of controversy long since settled adversely to their claim. They have advanced no claim founded on the Fifth Amendment's somewhat related guaranty against self-incrimination, whether or not for the sufficient reason among others that this privilege gives no protection to corporations or their officers against the production of corporate records pursuant to lawful judicial order, which is all these cases involve.⁷¹

* * *

The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure.⁷² * * *

⁷⁰ [Ed.] Those footnotes which have been included have been renumbered.

⁷¹ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 S. Ct. 370; *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 S. Ct. 538; *Essgee Co. v. United States*, 262 U. S. 151, 67 L. ed. 917, 43 S. Ct. 514; *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 726, 88 L. ed. 1024, 64 S. Ct. 805; *Cf. United States v. White*, 322 U. S. 694, 88 L. ed. 1542, 64 S. Ct. 1248.

⁷² "In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a reasonable exercise of the power." *Lasson, Development of the Fourth Amendment to the United States Constitution*, 137, citing *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 49, 14 S. Ct. 1125; *Hale v. Henkel*, 201 U. S. 43, 76, 50 L. ed. 652, 26 S. Ct. 370; *Cf. Boyd v. United States*, 116 U. S. at 634-635. 29 L. ed. 746, 6 S. Ct. 524 (as to which see also notes 33 and 36): " * * * We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited * * * is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

See also *Handler, Constitutionality of Investigations of the Federal Trade Commission* (1928) 28 Col. L. Rev. 708, 905, at 909 ff., and authorities cited, characterizing the identification of an order for production with an actual search or seizure as "the figurative interpretation." P. 917, n. 56.

* * * The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority.

* * *

The confusion obscuring the basic distinction between actual and so-called "constructive" search has been accentuated where the records and papers sought are of corporate character as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions.⁷³ It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it.⁷⁴ And, although the Fourth Amendment has been held applicable to corporations notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 S. Ct. 538, distinguishing the earlier quite different one of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 742, 6 S. Ct. 524,⁷⁵ held the process not invalid under the Fourth Amendment although it broadly required the production of copies of letters and telegrams "signed or purporting to be signed by the President of said company during the month[s] of May and June, 1909; in

⁷³ In the leading case of *Boyd v. United States*, 116 U. S. 616, 630, 29 L. ed. 746, 6 S. Ct. 524, Mr. Justice Bradley, speaking for the Court in relation to the compelled production of "a man's own testimony or of his private papers [specifically a business invoice] to be used as evidence to convict him of crime or to forfeit his goods," said in a much quoted statement: "In this regard the Fourth and Fifth Amendments run almost into each other."

⁷⁴ *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 S. Ct. 538; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 S. Ct. 370; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 S. Ct. 563.

⁷⁵ * * * The ruling was limited, in view of the facts, to criminal proceedings and proceedings for forfeiture of property. Only a single document was called for. The vitiating element lay in the incriminating character of the unusual provision for enforcement. The statute provided that failure to produce might be taken as a confession of whatever might be alleged in the motion for production.

regard to an alleged^{*} violation of the statutes of the United States by C. C. Wilson." 221 U. S. at 368, 375.

The Wilson case has set the pattern of later decisions and has been followed without qualification of its ruling. Contrary suggestions or implications may be explained as dicta; or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doctrine developed in relation to "constructive search"; or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history.⁷⁶ But no case has been cited or found in which, upon similar facts, the Wilson doctrine has not been followed. Nor in any has Congress been adjudged to have exceeded its authority, with the single exception of *Boyd v. United States*, *supra*, which differed from both the Wilson case and the present one in providing a drastically incriminating method of enforcement which was applied to the production of partners' business records. * * *

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is

⁷⁶ Thus, the aggravating circumstance in *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 68 L. ed. 696, 44 S. Ct. 336, cf. note 27, seems to have been the Commission's claim of "an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of § 5." 264 U. S. at 305. The Court said: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." P. 396. (Emphasis added). Cf. *Silverthorne Lumber Co. v. United States*, *supra*, note 39.

However in *Wheeler v. United States*, 226 U. S. 478, 52 L. ed. 309, 33 S. Ct. 158, where no element of actual search and seizure was present, a subpoena was enforced which called for copies of all letters and telegrams, all cash books, ledgers, journals and other account books of the corporation covering a period of fifteen months; cf. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 49, 14 S. Ct. 1125, and in *Brown v. United States*, 276 U. S. 134, 72 L. ed. 500, 48 S. Ct. 288, the subpoena called for all letters, telegrams or copies thereof passing between a national trade association and its members, including their officers and agents, over a period of two and one-half years, with reference to eighteen different items. The Court, by Mr. Justice Sutherland, said: "The subpoena * * * specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. * * *"

in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

* * *

* * * the Administrator's * * * investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's or the court's in issuing other pretrial orders for the discovery of evidence,⁷⁷ and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority * * *

* * * Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint. In view of these safeguards, the expressed fears of unwarranted intrusions upon personal liberty are effective only to recall Mr. Justice Cardozo's reply

⁷⁷ The bill of discovery in equity would seem to furnish an instance. Cf. *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U. S. 689, 696-697, 77 L. ed. 1449, 53 S. Ct. 736. See also the provisions for pretrial examination and the taking of depositions, Federal Rules of Civil Procedure, Rules 26 (b), 30 (d), 45; *Union Central Life Insurance Co. v. Burger*, 27 F. Supp. 556; *Bloomer v. Sirian Lamp Co.*, 4 F. R. D. 167, 8 F. R. S. 26b.51, Case 3; *Lewis v. United Air Lines Transport Corp.*, 27 F. Supp. 946, 947. The power of Congress itself to call for information presents a related illustration. *McGrain v. Daugherty*, 273 U. S. 135, 156-158, 71 L. ed. 580, 47 S. Ct. 319, 50 A. L. R. 1.

to the same exaggerated forebodings in Jones v. Securities & Exchange Commission: "Historians may find hyperbole in the sanguinary simile."

* * *

HEARST v. BLACK

U. S. Court of Appeals for the District of Columbia, 1936

87 Fed. Rep., 2d, 68

GRONER, J. Appellant is engaged in the business of publishing daily newspapers and magazines. In March of this year he brought in the court below his bill to enjoin the Special Senate Committee * * * from copying and using telegraphic messages in the possession of the telegraph companies sent by him to his employees in the conduct of his business. The bill alleges that in the month of September, 1935, the Senate Committee under blanket subpoenas duces tecum demanded of the telegraph companies doing business in the City of Washington the delivery to it (the committee) of all communications—i.e., telegraph messages—transmitted through the offices of such companies during the period February 1, 1935, to September 1, 1935; * * * [these were] turned * * * over to the Senate Committee; that among the telegrams examined and copied were messages from appellant to his associates and employees and messages from his associates and employees to him which had no connection with the subject matter of the investigation—all of which were sent in the regular and orderly conduct of the business in which appellant was engaged; that the use of the messages will result in the disclosure of the contents to the committee and to the general public and will disclose to appellant's business competitors privileged and private information relating to his private business affairs and will result in irreparable injury to appellant.

The bill further alleges that the members of the Senate Committee are about to make further search in an effort to gather up additional messages which have passed between appellant and his associates and employees and that the commission is ready and willing to co-operate in the illegal seizure of such messages unless restrained by the court.

Appellees, who are the members of the Senate Committee, filed a special appearance through counsel and a motion to dismiss the bill of complaint for lack of jurisdiction. * * *

The District Court refused to grant the injunction *pendente lite* and for lack of jurisdiction dismissed the bill as to the Senate Committee, * * * [And] because of the importance of the question raised as to the Senate Committee, we granted a special appeal.

* * *

The Senate Committee was appointed pursuant to two resolutions of the Senate, the first July 11, 1935, and the second July

29, 1935. The committee was authorized to investigate "all lobbying activities and all efforts to influence, encourage, promote, or retard legislation, directly or indirectly, in connection with the so-called 'holding company bill,' or any other matter or proposal affecting legislation"; to investigate also the financial structure of persons, companies, corporations, partnerships, or groups seeking to influence the passage or defeat of legislation; to investigate their political contributions and activities, and their efforts to control the sources and mediums of communication and information. The resolutions permit the committee to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents as it deems advisable.

Appellant's bill does not challenge the power of the committee in any of the respects just mentioned, but rests on the proposition that the [Federal] Communications Commission was without lawful authority to coerce the telegraph companies, over which it has supervisory control, to make the contents of appellant's telegrams available to the Senate Committee or any one else—and that the committee is now unlawfully in possession of the messages and therefore without legal right to retain, disclose, or in any manner use them. The judge of the lower court, as we assume from his statement from the bench, was of the opinion that, though the court would have had jurisdiction to restrain the commission and its agents from doing an unlawful act, it ought not to grant the prayer for injunction because the things charged—whether lawful or unlawful—had been done before the filing of the bill, and because the commission had then disclaimed any purpose to give any further assistance to the committee to obtain private telegraph messages. As to the Senate Committee the court held it had no jurisdiction. In dismissing the bill as to it, the judge said: "If the Senate committee has been proceeding in a way which some people might regard as unlawful, it is better to let them continue to do it and let that be corrected in some other way than it is for me to proceed in the way that seems to me to be unlawful to attempt to correct what they do that I do not agree with."

As the allegations of the bill are not denied, we are obliged to take them as true. And in that view we are of opinion that the resolution adopted by the commission, under which its agents took possession of the telegraph companies' offices and examined wholesale the thousands of private telegraph messages received and dispatched therefrom over a period of seven months—for the purpose of securing to the Senate Committee knowledge of the contents of the messages—was without authority of law and contrary to the very terms of the act under which the Commission was constituted. * * *

* * *

In principle * * * we think that a dragnet seizure of private telegraph messages as is alleged in the bill, whether made by persons professing to act under color of authority from the government or by persons acting as individuals, is a trespass which a court of equity has power to enjoin. As the Supreme Court said in *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, 44 S. Ct. 336, 337, 68 L. ed. 696, 32 A. L. R. 786: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." And we cannot doubt that the purpose and intent of Congress, in including in the Communications Act a positive prohibition against disclosure, was to recognize this principle and give it effect.

And so we think the law is settled that, if appellant were before the Senate Committee as a witness and were questioned as to matters unrelated to the legislative business in hand, as his bill alleges is true of the messages in question, he would be entitled to refuse to answer; and if, for his supposed contumacy, he were imprisoned, he could secure his release on habeas corpus. And so, also, if a Senate Committee were to attempt to force a telegraph company to produce telegrams not pertinent to the matters the committee was created to investigate, the company could be restrained at the instance of the sender of the telegrams, for as the Supreme Court said in *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319, 71 L. ed. 580, 50 A. L. R. 1, the decisions in *Kilbourne v. Thompson*, 103 U. S. 168, 26 L. ed. 377 and *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448, 61 L. ed. 881, L. R. A. 1917F, 279, Am. Cas. 1918B, 371, point, in such circumstances, to admissible measures of relief. * * * if the bill had been filed while the trespass was in process it would have been the duty of the lower court by order on the commission or the telegraph companies or the agents of the committee to enjoin the acts complained of. But the main question we have to decide is in a different aspect. Here, as appears both from the bill and by admission of parties, the committee has obtained copies of the telegrams and they are now physically in its possession; and this means neither more nor less than that they are in the hands of the Senate, for the committee is a part of the Senate (*McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319, 71 L. ed. 580, 50 A. L. R. 1) created, as we have seen, by the Senate for the purpose of investigating the subject of lobbying, in aid of proposed legislation. The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that

the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.

The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others. "This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." *Springer v. Government of Philippine Islands*, 277 U. S. 189, 201, 48 S. Ct. 480, 482, 72 L. ed. 845. In *McChord v. Louisville R. R. Co.*, 183 U. S. 483, 22 S. Ct. 165, 46 L. ed. 289, a somewhat similar question arose. There the railroad sought to enjoin *McChord* and others, as Railroad Commissioners of the State of Kentucky, from acting as directed by the Legislature of that State in connection with the establishment of railroad rates. The lower court granted the injunction, but the Supreme Court reversed the decree on the ground that the making of rates was a legislative function and as such could not be controlled by a court. The opinion cites and quotes from *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 S. Ct. 161, 41 L. ed. 518, and *Alpers v. San Francisco (C. C.)* 32 F. 503. Both of these cases involve the attempted restraint of a city council by a court. In the latter case, which was decided by Mr. Justice Field, the complainant alleged he had a contract with the city and county of San Francisco, and that the council proposed to pass an ordinance which would impair the obligation of the contract. In other words, the enactment of an unconstitutional law. After recognizing that what complainant said was true, the court said (32 F. 503, at page 506): "The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. * * * The fact that * * * the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a con-

tract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

If courts cannot enjoin the enactment of unconstitutional laws—as to which proposition there can be no doubt—then by the same token they cannot enjoin legislative debate or discussion of constitutional measures because of the incidental disclosure or publication of knowledge unconstitutionally acquired. If it be insisted that this is the acknowledgment of a power whose plenitude may become a cataclysm, the answer is that the Congress "is as much the guardian of the liberties and welfare of the people as the courts"; and in this view the assumption may properly be indulged that, attention being called to the unlawful nature of the search, the Senate will not use its proceeds in disregard of appellant's rights.

Decree affirmed.

NOTE

SUBPOENA POWERS IN ADMINISTRATIVE INVESTIGATIONS—AN ANALOGY

Consider the relevance to the immediate problem of the following cases which deal with administrative investigations:

(a) *Smith v. Porter*, 158 F. 2d 372 (C. C. A. 9th 1946), in which in an investigation, under the Price Control Act, an OPA subpoena was upheld which required the production of "the articles of partnership, bank statements and cancelled checks for 1943, 1944, and 1945, general accounts, physical inventories for the years named, general ledger accounts, and financial statements for those years together with copies of contracts in effect during that period, correspondence files, copies of sales invoices, bills of lading or other shipping papers, and all vouchers or purchase invoices."

(b) *United States v. Cream Products Distribution Co.*, 156 F. 2d 732 (C. C. A. 9th 1946), in which the War Food Administrator was authorized by statute to make such investigations as were necessary or appropriate to enforce the Act, and to require production of any records which are relevant to the inquiry. The company argued that, inasmuch as the investigation was limited to the problem of the use of milk solids in frozen dairy foods, an order compelling the production of all records relating to purchases and sales was not proper. The court upheld the order.

(c) *Provenzano v. Porter*, 159 F. 2d 47 (C. C. A. 9th 1947), *cert. denied*, 67 Sup. Ct. 1303 (1947), which involved a subpoena requiring production of "employees' individual time-cards and payroll records, sales and general ledgers, and other records" relating to costs and selling prices. In upholding the subpoena, the court stated: "The records and data called for are of the character ordinarily thought relevant and material to an in-

vestigation under the Price Control Act * * * In the course of his administration of the act the Administrator is empowered to conduct investigations for the purpose of placing dealers in commodities and services in their proper category under the regulations; and it is plain that the records ordered produced in this instance are relevant to a lawful inquiry." *Id* at 48-9.

(d) *Shotkin v. Nelson*, 146 F. 2d 402 (C. C. A. 10th 1944), in which the War Production Board, investigating compliance with an order concerning fluorescent lights, ordered a company to produce "all sales invoices, purchase orders, preference rating records, accounts receivable, notes receivable, bookkeeping journals and general ledgers, and all inventories taken in 1943 * * * showing the purchase, ownership and sale of electrical and light fixtures and supplies by you and by all and any of the companies * * * named, during the years 1943 and 1944." The court held that the subpoena was too broad for the purposes of the investigation.

May these cases be useful in carving out the appropriate area of the subpoena powers in investigations by legislative committees? Congress has, over a period of years, given increasing authority to federal administrative agencies to conduct investigations for such purposes as recommending changes in existing legislation, or for guiding administrative agencies in the exercise of their rule-making (i. e. legislative) functions. The problems confronting the witness called to testify before such agencies are similar to those involved in Congressional committee investigations—the problems of breadth and relevance, the extent of the subpoena power, self-incrimination, unreasonable searches and seizures, etc. But unlike Congress, which may exercise its own contempt powers, federal administrative agencies must rely exclusively on the arm of the judiciary for sanctions against contumacious witnesses;⁷⁸ and, unlike the treatment accorded by the judiciary to Congressional committee investigations, the inquisitorial powers of administrative bodies have had a longer history of judicial restraint and limitation⁷⁹ behind them. The tide, however, seems to have turned in the direction of greater leeway for the administrative investigation. In a well-documented article, on the Administrative Power of Investigation, (1947) 56 *Yale L. J.* 1111, 1153, Prof. K. C. Davis sums up this development as follows:

"No longer do federal courts in the name of civil liberties place substantial barriers in the way of administrative agencies which seek business facts deemed necessary to the proper performance of administrative tasks. A half

⁷⁸ *I. C. C. v. Brimson*, 154 U. S. 447 (1894). Suggestions have been made that this be changed by legislation. See Albertsworth, *Administrative Contempt Powers: A Problem in Technique*, 25 *A. B. A. J.* 954 (1939).

⁷⁹ Dimock, "Congressional Investigating Committees," 47 *Johns Hopkins University Studies* (1929), 151.

century of congressional insistence upon a broad administrative power of investigation has at last overpowered the judicial effort to protect business privacy. A few decades ago the judges wrote into the Constitution the idea that disclosures could be required only in connection with adjudication and law enforcement, but the Constitution now permits use of subpoenas to support investigations for any lawfully authorized purpose—for making rules, for recommending legislation, for determining policy, for trying to find out whether something ought to be done and if so what. Constitutional restrictions on searches and seizures and self-incrimination until recent times frequently prevented agencies from securing needed information, but those restrictions are now rewritten so as to affect only negligibly the issuance and enforcement of orders compelling disclosure of such records as are relevant to a legitimate investigation. Courts in recent years are freely permitting much of what courts a generation ago condemned as fishing expeditions. Agencies whose regulatory powers rest on the commerce clause are no longer prohibited from investigating intrastate activities. The old Constitution often thwarted investigations of businesses which were deemed not to be “affected with a public interest,” but this concept has disappeared, and in its place is the idea that records which a statute requires to be kept are “quasi-public” and cannot be withheld from official inspection. Unlike a number of state agencies which have power to punish for contempt, all federal agencies still must rely on courts for enforcement of subpoenas, but courts now enforce administrative subpoenas without requiring a showing either of probable cause to believe the law has been violated or of probable jurisdiction of the agency.”

If the trend is to give administrative tribunals greater leeway in exercising their powers of investigation may one expect any lesser leeway with respect to investigations by Congressional committees?

SUBJECTION OF WITNESSES TO CIVIL ACTION

Problem F:

EXCERPTS FROM THE INVESTIGATION OF “THE HOLLYWOOD TEN”

The following appeared in the “Hearings Regarding the Communist Infiltration of the Motion Picture Industry”:^{••}

“Mr. Stripling. [Chief Investigator, Committee on Un-American Activities]. Mr. [Rupert] Hughes [author, playwright] * * * by observing their [i. e. the Hollywood playwrights, screen writers, etc.] activities and the line which they followed, weren’t you able to discern which ones were closely associated with the Communists, even though you do not have their Communist Party cards?

Mr. Hughes. Yes. You can’t help smelling them, in a way. Their ideas are all one way. I have had furious debates with

^{••} Hearings before the Committee on Un-American Activities (1947), H. R. 80th Cong. 1st sess.

Emmet Lavery [playwright, screen writer] in forums and privately in the Authors' Guild, where they tried to force their authority on the Authors' Guild, the Dramatists' Guild.

Lavery is a good Catholic, he says, but I say a man whose views are Communist, whose friends are Communists, and whose work is communistic is a Communist. I would say if a wolf wears sheep's clothing that man is a wolf."¹

Assume that one accused of being a Communist or a Communist sympathizer actually is not one and that the adverse publicity resulting from such a statement as above costs the accused his job, what legal action, if any, may be taken against the person making the accusation in a Congressional investigation? See, generally, Prosser on Torts (1941), sec. 94.

PRIVILEGED COMMUNICATIONS

Problem G:

From the same "Hearings" appeared the following:²

"The Chairman. [Rep. J. Parnell Thomas] Did you advise your clients not to answer questions put to them by the committee or its chief investigator?

Mr. Kenny. [Attorney] You are not a lawyer, Mr. Thomas, and, as I think your counsel, or someone, would advise you, that would be highly inappropriate. If there is one thing that is sacred in this country it is the matter of advice that a counsel gives his clients.

The Chairman. Oh, yes.

Mr. Kenny. I am sure you didn't intend to invade that.

The Chairman. I appreciate that. I am not a lawyer; I admit that.

Mr. Kenny. No.

The Chairman. But I would like to know, as the chairman of a congressional committee, whether or not you, as the attorney for these witnesses, advised them not to answer questions put to them by this congressional committee or its chief investigator.

Mr. Kenny. Mr. Thomas, I would be disgraced before every one of 100,000 lawyers in the United States if I answered that question. That is one thing that cannot be answered.

The Chairman. Have you got the statute there, Mr. Stripling?

Mr. Stripling. Yes.

The Chairman. I would like to read the statute, because if you did give them that advice you would be doing everything you possibly could to frustrate the congressional committee, and you would be in more serious trouble than some of your witnesses.

¹ *Ibid*, 129.

² *Ibid*, 368.

Mr. Kenny. Well, Mr. Thomas, I am not here to be lectured by this committee. I do think that it is the highest impropriety to ask a lawyer what advice he gave his client.

The Chairman. I would like to read this statute.

Mr. Kenny. Oh, yes; surely.

The Chairman. This is Criminal Code section 37, Conspiring to Commit an Offense Against the United States:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000 or imprisoned not more than 2 years or both."

May Mr. Kenny rely upon the privileged relationship between attorney and client? See, generally, 8 Wigmore, Evidence (1940), sec. 2290 *et seq.*; 5 Jones, Commentaries on Evidence (1926), secs. 2155 *et seq.*, for a treatment of the problem of privileged relationship in the judicial arena. Do the same considerations apply in legislative investigations? Are the legislative committees bound by the common law rules relating to privileged communications between attorney and client, or are these rules merely standards which committees may follow in their discretion? Regarding this latter question, what inferences, if any, may be drawn from *Stewart v. Blaine*, 1 MacArthur (D. C.) 453 (1874) and *Jurney v. MacCracken*, 294 U. S. 125, 79 L. ed. 802, 55 S. Ct. 375 (1935)?

Note: A Practical View of the Rights of Witnesses before Congressional Investigating Committees

The foregoing materials are primarily concerned with the limitations upon the powers of congressional investigating committees—with the demarcation of the legal rights of witnesses haled before these committees. There is always, however, the very practical problem of determining under what circumstances, if at all, these rights may most advantageously be asserted. Consider, for example, the following observations of Gose in his study of Congressional Investigating Power, (1935) 10 Washington L. Rev. 138, 152-154:

"The rights of the witness are reducible to the following:

1. He may with impunity refuse to respond to any subpoena, question or demand made, which concerns only his private affairs.
2. He may likewise refuse to respond to any demand not pertinent to the inquiry.
3. He may in a proper case refuse to answer in exercise of his right to refrain from self-incrimination.
4. He may resort to the courts to review the right of the investigating body to take punitive action against him.

Abstractly stated, these are substantial rights, but practically, aside from the constitutional safeguards surrounding self-incrimination, their value is dubious. Laying aside the number of instances in which, by reason of attendant publicity, the witness submits rather than be subjected to insinuations of guilt and dishonesty for defiance or silence, the exercise of the first two of these rights is attended with very considerable hazard. A refusal to respond predicated upon a challenge of congressional power or impertinence of a particular question invites immediate and drastic punishment as a condition precedent to trial before an impartial tribunal. Every witness is confronted by the practical problem of weighing the relative value of his belief as to his personal rights against the possible consequences of a mistaken view of the law on the part of himself or his counsel. Actually he has to submit to arrest and remain in custody until a writ of *habeas corpus* may issue in order to test his rights at all. This is so foreign to his common experience with the law that it is not surprising that he feels aggrieved against the principles which make such a situation possible.

In common experience witnesses are acquainted with the judicial practice of taking testimony. That practice requires the presence of opposing counsel and an impartial arbiter. Whether the witness be a party to the litigation or not, counsel for one side is normally jealous to protect his interest and alert to challenge any excess on the part of opposing counsel. Any inquiry violating the rights of the witness or going beyond issues fixed by the pleadings almost surely will be met with an objection. The legal issue then raised will be passed upon by the judge, and his decision, presumptively impartial, must be made before the witness can be required to answer. The test thus precedes possible punishment.

Contrast this to the investigating committee combining the function of inquisitor and arbiter, frequently definitely hostile to the witness and interested far more in the possible answer than in the rights or feelings of the witness, operating under its own rules and without any very limited or tested issues to define accurately the boundaries of pertinent inquiry; add to this the position of the witness between the Scylla of submission and the Charybdis of jail, and it requires no elaborate exposition to show that abstract definitions of the rights of the witness do not afford him much practical comfort or assistance."

C. CURBING THE EXCESSES OF CONGRESSIONAL INVESTIGATING COMMITTEES

Whether the powers of Congressional investigating committees should be curbed has been the subject of long-standing controversy. There are those who regard the Congressional investigation as "* * * that legalized atrocity * * * where Congressmen starved of their legitimate food for thought, go on a wild and feverish man-hunt, and do not stop at cannibal-

ism";⁸³ there are those, who on the other hand, regard "the informing function of Congress * * * [as] preferred to its legislative function,"⁸⁴ and the committees of investigation "an important instrument for the protection of the rights and liberties of the people";⁸⁵ there are those, who, conscious of the possible abuses of Congressional investigations, nevertheless feel that "if the alternatives are no inquiry or an inquiry that is abused, then the choice must be for the latter."⁸⁶ On the whole, however, it would seem that most of the criticisms of Congressional investigations are attacks upon their abuses and excesses, rather than upon the investigative process itself.⁸⁷

Problem H:

Assuming the above to be the case, what would you recommend by way of legislation or otherwise, for the elimination or curbing of the abuses of legislative investigations?

What do you think of the efficacy of the following Senate Concurrent Resolution 44, introduced by Senator Lucas of Illinois during the 80th Congress, 2nd Session. Assuming that it is passed, what would its legal effect be? Suppose, for example, that the "rights" in Sec. 3 are denied a witness? What recourse would he have?

CONCURRENT RESOLUTION

Resolved by the Senate (the House of Representatives concurring), That the following provisions of this concurrent resolution are adopted as an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively.

Section 2. Any person who believes that testimony or other evidence given in a public hearing before any committee tends to defame him or otherwise adversely affect his reputation may file with the committee a sworn statement, concerning such testimony, which shall be made a part of the record of such hearing.

Section 3. Such a person shall in addition have the right (a) to testify personally in his own behalf; (b) to have the committee secure the appearance of witnesses requested by him for the purpose of testifying in his behalf, and to examine such witnesses, either personally or by counsel, but no more than four such witnesses shall be called; and (c) to have the committee secure the appearance of witnesses whose testimony adversely affected him, and to cross-examine such witnesses, either

⁸³ Lippman, Public Opinion 289 (1922).

⁸⁴ Wilson, Congressional Government 203 (1900).

⁸⁵ Flynn, Senate Inquisitors and Private Rights, 161 Harper's Magazine 364 (1930).

⁸⁶ Rogers, The American Senate 206 (1926).

⁸⁷ This view is shared by Ogden, The Dies Committee 5 (1945).

personally or by counsel, but such cross-examination shall be limited to one hour as to any one witness.

Section 4. Any person who wishes to avail himself of the rights accorded by section 3 shall, within thirty days of the receipt by the committee of the testimony complained of, file a petition with the committee requesting the fixing of a time and place for the receiving of testimony or the conduct of cross-examination and designating the witnesses to be summoned. Such a petition shall be accompanied by the sworn statement of the petitioner that the petition is not filed for the purpose of delaying or obstructing the work of the committee, but because his reputation has been unjustifiably damaged or otherwise adversely affected by false accusations or inference. The committee shall, within ten days after the receipt of such a petition, fix a time and place for the receiving of testimony or the conduct of cross-examination, which time shall not be later than thirty days after the receipt of the petition, and shall secure the appearance at such time and place of the witnesses designated in the petition.

Section 5. Any witness summoned at a public or private hearing before any committee shall have the right to be accompanied by counsel. Such counsel shall be allowed to observe the hearing, but shall not be allowed to participate therein or to advise the witness while on the witness stand unless the committee in its discretion shall otherwise determine.

Section 6. In the conduct of hearings, the evidence received shall, so far as possible, be relevant and germane to the subject of the hearing.

Section 7. If the testimony of a witness at a private or public hearing before any committee is reported stenographically, such witness shall be entitled to a stenographic transcript of such testimony upon payment of the cost of the transcript.

Section 8. A committee shall not publish or file any report, interim or final, unless and until a meeting of the committee has been called upon proper notice and such report has been approved by a majority of those voting at such meeting.

Section 9. No committee or employee thereof shall publish or file any statement or report alleging misconduct by, or otherwise adversely commenting on, any person unless and until such person has been advised of the alleged misconduct or adverse comment and has been given a reasonable opportunity to present to the committee a sworn statement with respect thereto as provided in section 2.

Section 10. No member or employee of a committee shall, for compensation, speak, lecture, or write about the committee, its purposes, procedures, accomplishments, or reports during the existence of the committee and while he is a member of the committee or in its employ.

Section 11. As used in this concurrent resolution, the term "committee" includes a standing or select committee of either House of Congress, a joint committee of the two Houses, and a duly authorized subcommittee of any of the foregoing.

Problem I:

The following appeared in "Letters to the Times", New York Times, Sept. 5, 1948, p. 6, Col. 7.^{••} What is your evaluation of the efficacy of this proposal:

"To The Editor Of The New York Times:

The purpose of this letter is to suggest a method of reconciling full freedom of inquiry for Congressional committees with a reasonable opportunity for innocent citizens to protect reputations damaged by testimony before such committees.

The method proposed is for Congress to enact a statute creating a civil penalty for false testimony before a Congressional committee. The penalty would be the right of any injured person to collect damages in a Federal court action against the false witness. The new law should also provide that such damage actions be placed at the top of all court calendars and expedited in every way so as to permit the injured party to restore his reputation as quickly as possible.

At present, it is a Federal criminal offense to testify falsely before a Congressional committee, just as it is a Federal criminal offense to violate the anti-trust laws. But the initiative does not rest with the victim of the crime, and this fact, together with the careful slowness of our criminal processes, makes the remedy of little benefit to the injured person. In the anti-trust field, Congress has tried to correct this condition by giving the victim a direct and personal remedy—the right to collect triple damages from the wrongdoer in a civil action.

The same solution seems entirely appropriate to protect the victim of false testimony before a Congressional committee. The House Un-American Activities Committee has admitted in its latest report that innocent people may be greatly wronged by its hearings. When there is a wrong, there ought to be a remedy. The innocent victim cannot ordinarily sue his traducer for slander, because testimony given in good faith before a Congressional committee is considered to be privileged by our courts. Only Congress can remove that privilege and provide the remedy for a wrong committed in the very Congressional presence.

The immunity of a witness from slander actions is a very necessary thing in the court room, but it hardly seems justified in the forum of a Congressional hearing. As has often been pointed out, a court has the time and the means for bringing out the truth in ways which are much superior to those available to busy Congressmen.

^{••} Reprinted with the permission of the New York Times.

A court trial is a contest with fixed rules. It permits cross-examination and confrontation, and allows expert attorneys almost unlimited scope and time in amassing and introducing evidence. It rules out certain types of testimony as unreliable. Above all, it is presided over by an impartial expert—the judge—whose only job is to do justice and arrive at the truth, free of the many cares of statesmanship and politics which rightly concern our legislators.

By removing immunity from its witnesses Congress would not impair the usefulness of its committees or their ability to arrive at the truth. Congress would not be discouraging truthful witnesses and it would retain its present power to compel the truth from timid or recalcitrant witnesses.

Such action might even be welcomed by many potential witnesses who do not relish the prospect of being called liars and perjurers by those who may follow them on the stand, without opportunity for redress. It would give both accuser and accused a forum in which to wage a fair battle, under traditionally accepted rules.

In any event, the proposed measure would add enormously to the credibility of the testimony at committee hearings and to public acceptance of committee findings. It would preserve full freedom of Congressional inquiry and at the same time afford some measure of fair play to the many innocent people who can so easily be wronged in the daily course of representative government—even the best that man has yet devised.

Lloyd N. Cutler"

Problem J:

What do you think of the following rules of procedure adopted by the Procurement and Buildings Subcommittee of the House Committee (80th Cong.) on Expenditures in the Executive Departments, which according to the chairman, was "designed to meet what we regard as the valid criticisms leveled at Congressional committees both on the floor of the House and in the press throughout the country":⁸⁹

RULES OF PROCEDURE

1. Hearings

- A. Hearings shall be called by the Chairman of the Subcommittee on written notice to each member.
- B. Hearings shall be held at the time and place specified by the Chairman in the notice to Subcommittee members.
- C. All hearings conducted by the Subcommittee shall be open to the public, except executive sessions for marking up bills or for voting, or when the Subcommittee, or the whole Committee, by a majority vote orders an executive session.

⁸⁹ Statement of Representative George H. Bender, Press Release, Thursday A.M., April 8, 1948.

- D. No witness shall be examined in executive session hearings unless at least two members of the Subcommittee and the Counsel or a Special or Assistant Counsel of the Subcommittee shall be present.

2. Transcript of hearings

- A. A stenographic record shall be kept of all testimony given to the Subcommittee in public hearings or in executive session.
- B. The stenographic transcript of all public hearings shall be available to the public; and any interested person shall be entitled to a copy of such stenographic transcript upon payment of the cost thereof.
- C. The stenographic transcript of all testimony given in executive session shall be available to the public upon any part thereof being made public by the Subcommittee, in which event any interested person shall be entitled to a copy of such stenographic transcript upon payment of the cost thereof.
- D. The stenographic record of any executive session may be made available to any interested person under such conditions as the Subcommittee may prescribe without being made public.
- E. No transcript of testimony under oath given at a public hearing or in executive session shall be altered or edited.

3. Attorneys

- A. All witnesses before this Subcommittee in public hearing or in executive session shall be permitted to be accompanied by counsel of their choice.
- B. The attorney for any witness may advise his client as to whether he should answer any question, stating the grounds of any objection. Private counsel shall not be allowed to otherwise participate in any hearing unless permission is expressly granted by the Subcommittee.

4. Statements for Record

- A. Any witness at public hearing or executive session may file a sworn relevant statement which shall become part of the record, and a brief summary of which may be read aloud by the witness, provided the statement and brief summary thereof are furnished to the Subcommittee at least 4 days before the date of the hearing or 4 days after the witness is notified of the date thereof, whichever is the later time. No witness shall be under obligation to make or file such a statement.
- B. Any person who believes that testimony or other evidence given in a public hearing before the Subcommittee tends to defame him or otherwise adversely affect his reputation may file with the Subcommittee a sworn statement concerning such testimony or evidence with-

in 10 days of the receipt thereof by the Subcommittee. Such sworn statement if duly presented and relevant shall become part of the record of such hearing, but shall not preclude further examination of the person submitting the same.

- C. The Subcommittee reserves the right to require any statement or summary thereof to be put in concise form before it is included in the record or read aloud, as the case may be.

5. Subjects of inquiry

- A. All evidence received shall be, as far as possible, relevant and germane to the subject of the hearing.

6. Reports

- A. The Subcommittee shall not file or publish any report until such report has been approved by a majority of the members present at a duly called executive session hearing.

7. Subpoenas

- A. All subpoenas commanding the appearance of a witness or the production of documents shall be signed by the Chairman of the Subcommittee or, in his absence, by a member of the Subcommittee designated by the Chairman and attested by the Clerk of the House of Representatives.

8. Effective date—amendment

- A. These rules shall be effective April 8, 1948, and may be amended from time to time by a majority vote of the members of the Subcommittee.

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MATERIALS AND PROBLEMS
ON
LEGISLATION

SUPPLEMENT

BY
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PROFESSOR OF LAW, UNIVERSITY OF NEBRASKA

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SUPPLEMENT TO MATERIALS AND PROBLEMS ON LEGISLATION

FEDERAL FOOD AND DRUG ACT OF JUNE 30, 1906
1906, C. 3915, 34 Stat. 768

AN ACT

For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

Section 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not ex-

ceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: Provided, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

Section 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

Section 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in

such manner as may be prescribed by the rules and regulations aforesaid.

Section 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

Section 6. That the term "drug," as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

Section 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation: Provided, That no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Section 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any

morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

Section 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

Section 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District,

or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: Provided, however, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

Section 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: Provided: That the Secretary of the Treasury may deliver to the consignee such goods pending examination and

decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: And provided further, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

Section 12. That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

Section 13. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

* * *

73D CONGRESS, 1ST SESSION—S. 1944

IN THE SENATE OF THE UNITED STATES

June 6 (calendar day, June 12), 1933

Mr. COPELAND introduced the following bill, which was read twice
and referred to the Committee on Commerce

A BILL

To prevent the manufacture, shipment, and sale of adulterated or misbranded food, drugs, and cosmetics, and to regulate traffic therein; to prevent the false advertisement of food, drugs, cosmetics, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Food and Drugs Act."

DEFINITIONS

Section 2. As used in this Act, unless the context otherwise indicates—

(a) The term "food" includes all substances and preparations used for, or entering into the composition of, food, drink, confectionery, or condiment for man or other animals.

(b) The term "drug" includes (1) all substances and preparations recognized in the United States Pharmacopoeia or Na-

tional Formulary or supplements thereto; and (2) all substances, preparations, and devices intended for use in the cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) all substances and preparations, other than food, and all devices, intended to affect the structure or any function of the body of man or other animals.

(c) The term "cosmetic" includes all substances and preparations intended for cleansing, or altering the appearance of, or promoting the attractiveness of, the person. Except as indicated in paragraph (b) (3) of this section, the definitions of food, drug, and cosmetic shall not be construed as mutually exclusive.

(d) The term "territory" means any territory or possession of the United States.

(e) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, or between points within the same State or Territory but through any place outside thereof, and (2) commerce and manufacture within the District of Columbia or the Canal Zone or within any territory not organized with a legislative body.

(f) The term "person" includes individual, partnership, corporation, and association.

(g) The term "Secretary" means the Secretary of Agriculture.

(h) The term "label" means the principal label or labels (1) upon the immediate container of any food, drug, or cosmetic, and (2) upon the outside container or wrapper, if any there be, of the retail package of any food, drug, or cosmetic.

(i) The term "labeling" includes all labels and other written, printed, and graphic matter, in any form whatsoever, accompanying any food, drug, or cosmetic.

(j) The term "advertisement" includes all representations of fact or opinion disseminated in any manner or by any means other than by the labeling.

(k) The term "in package form" includes wrapped meats enclosed in paper or other materials as prepared by the manufacturers thereof for sale.

ADULTERATION OF FOOD

Section 3. A food shall be deemed to be adulterated—

(a) (1) If it is or may be dangerous to health; or (2) if it bears or contains any added poisonous or added deleterious substance prohibited, or in excess of the limits of tolerance prescribed, by regulations as hereinafter provided; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth; or (5) if it is the product of a diseased animal or of an animal which has died otherwise than by slaughter; or (6) if its container is composed of any poisonous or deleterious sub-

stance which may by contamination render the contents injurious to health.

(b) (1) If any valuable constituent has been in whole or in part abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or create a deceptive appearance.

(c) If it is confectionery and bears or contains any alcohol, resinous glaze, or nonnutritive substance except coloring and flavoring.

(d) If it contains a coal-tar color other than one from a batch that has been certified by the Secretary in accordance with regulations as hereinafter provided.

ADULTERATION OF DRUGS

Section 4. A drug shall be deemed to be adulterated—

(a) If it is or may be dangerous to health under the conditions of use prescribed in the labeling thereof.

(b) If its name is the same as or simulates a name recognized in the United States Pharmacopoeia or National Formulary or in any supplement thereto, official at the time the drug is introduced into the interstate commerce, or if it purports to be such a drug, and it fails to meet the definition, formula, and description set forth therein, or differs from the standard of strength, quality, or purity as determined by the tests or methods of assay set forth therein; except that whenever tests or methods of assay have not been prescribed therein or such tests or methods of assay as are prescribed are found by the Secretary to be insufficient, he is hereby authorized to prescribe by regulations, tests, or methods of assay for determining whether or not such drug complies with such standards. No drug shall be deemed to be adulterated under this paragraph if its label bears, in the manner and form prescribed by regulations of the Secretary, a statement indicating wherein its strength, quality, and purity differ from the standard of strength, quality, and purity set forth in the United States Pharmacopoeia or National Formulary or in any supplement thereto, official at the time the drug is introduced into interstate commerce, as determined by the tests or methods of assay applicable under this paragraph.

(c) If it is not subject to the provisions of paragraph (b) of this section and its identity or strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

(d) (1) If any substance has been mixed or packed therewith so as to reduce its quality or strength; or (2) if any substance has been substituted wholly or in part therefor.

ADULTERATION OF COSMETICS

Section 5. A cosmetic shall be deemed to be adulterated—

(a) If it is or may be injurious to the user under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual.

(b) If it bears or contains any poisonous or deleterious ingredient prohibited, or in excess of the limits of tolerance prescribed, by regulations as hereinafter provided.

MISBRANDING—GENERAL

Section 6. A food, drug, or cosmetic shall be deemed to be misbranded—

(a) If its labeling is in any particular false, or by ambiguity or inference creates a misleading impression regarding any food, drug, or cosmetic.

(b) If in package form it fails to bear a label containing: (1) the name and place of business of the manufacturer, packer, seller, or distributor; and (2) an accurate statement of the quantity of the contents in such terms of weight, measure, or numerical count as may be prescribed by regulations of the Secretary: Provided, That under subdivision (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages of foods and cosmetics shall be established, by regulations prescribed by the Secretary: And provided further, That such classes of canned foods as the Secretary finds, after notice and hearing, are, in accordance with the practice of the trade, labeled in substantial quantities at establishments other than the establishments where processed or packed, shall be exempted by regulations from the requirements of this paragraph during transportation from the establishment where processed or packed to an establishment for labeling, if such articles are labeled in conformity with the provisions of this Act prior to removal from such labeling establishment.

(c) If any word, statement, or other information required on the label to avoid adulteration or misbranding under any provisions of this Act is not prominently placed thereon in such a manner as to be easily seen and in such terms as to be readily intelligible to the purchasers and users of such articles under customary conditions of purchase and use.

MISBRANDING OF FOOD

Section 7. A food shall be deemed to be misbranded—

(a) If (1) its container is so made, formed, or filled as to mislead the purchaser, or (2) its contents fall below the standard of fill prescribed by regulations as hereinafter provided.

(b) If it is offered for sale under the name of another food.

(c) If it is an imitation of another food, except that no imitation shall be deemed to be misbranded under this paragraph if its label bears the word "imitation" in juxtaposition with and in type of the same size and prominence as the name of the food imitated.

(d) If it purports to be or is represented as a food for which a definition of identity has been prescribed by regulations as

hereinafter provided, and (1) fails to bear on its label the name of the food defined in such terms as the regulations specify, or (2) fails to conform to the definition.

(e) If it purports to be or is represented as a food for which standards of quality have been prescribed by regulations as hereinafter provided, and (1) fails to state on its label, if so required by the regulations, a standard of quality in such terms as the regulations specify, or (2) falls below the standard stated on the label.

(f) If it purports to be or is represented as a food for which no definition of identity has been prescribed by regulations as hereinafter provided, and its label fails to bear (1) the common or usual name of the food, if any there be, and (2) the common or usual name of each ingredient thereof in order of predominance by weight; except that spices, flavors, and artificial colors may be designated as such without naming each spice, flavor, or artificial color. The Secretary is hereby authorized to prescribe by regulations requirements for such further information on the label thereof as he may deem necessary to protect the public from deception.

MISBRANDING OF DRUGS

Section 8. A drug shall be deemed to be misbranded—

(a) (1) If its labeling bears the name of any disease for which the drug is not a specific cure but is a palliative, and fails to bear in juxtaposition with such name and in letters of the same size and prominence a statement that the drug is not a cure for such disease; or (2) if its labeling bears any representation, directly or by ambiguity or inference, concerning the effect of such drug which is contrary to the general agreement of medical opinion.

(b) If it is for internal use by man and contains any quantity of any of the following narcotic or hypnotic substances: Alpha eucaïne, barbital, beta eucaïne, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, morphine, opium, paraldehyde, peyote, sulphonmethane, or any narcotic or hypnotic derivative therefrom by actual or theoretical chemical reaction, and its label fails to bear the name and a statement, in the manner and form prescribed by regulations promulgated by the Secretary, of the quantity or proportion of such substance or derivative in juxtaposition with the statement "Warning—May be habit forming." The Secretary is hereby authorized by regulations prescribed after notice and hearing, to designate as narcotics or hypnotics within the meaning of this paragraph such other substances as he may find to possess narcotic or hypnotic properties.

(c) If it contains any quantity of ethyl alcohol, ethyl ether, or chloroform, and its label fails to bear a statement, in the manner and form prescribed by regulations of the Secretary, of the quantity or proportion of such substance.

(d) If it is not subject to the provisions of paragraph (i) of this section, and its labeling fails to bear complete and explicit directions for use: Provided, That the Secretary may by regulation exempt any drug from any requirement of this paragraph if he deems such requirement unnecessary for the protection of public health.

(e) If it is not subject to the provisions of paragraph (b) of section 4 and its label fails to bear (1) the common name of the drug, if any there be, and (2) the name and quantity or proportion of each medicinal or physiologically active ingredient thereof. The Secretary is hereby authorized to prescribe by regulations requirements for such further information on the label of such drug as he may deem necessary to protect the public health.

(f) If its name is the same as, or simulates, a name recognized in the United States Pharmacopoeia or National Formulary or any supplement thereto official at the time such drug is introduced into interstate commerce, and it is not packaged and labeled as prescribed therein.

(g) If it is a drug liable to deterioration, and is not packaged in such form or manner, or if its label fails to bear a statement of such precautions, as the Secretary may prescribe by regulations, after notice and hearing, for the protection of public health. The Secretary is hereby authorized to designate by regulations, prescribed after notice and hearing, as drugs liable to deterioration within the meaning of this paragraph, such drugs as he may find to be liable to deterioration.

(h) (1) If its container is so made, formed, or filled as to mislead the purchaser; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug.

(i) If it purports to be or is represented as a germicide, bactericide, disinfectant, or antiseptic for any use on or within the human or animal body and its labeling fails to bear a statement of each such use and, plainly and conspicuously and in juxtaposition therewith, the method and duration of application necessary to kill all micro-organisms in the vegetative or other active form with which it comes in contact when so used; except that no drug shall be deemed to be misbranded under this paragraph if its label bears a statement that it is a germicide, bactericide, disinfectant, or antiseptic for specific kinds of micro-organisms only, and its labeling bears a statement of each purported or represented use and, plainly and conspicuously and in juxtaposition therewith, the conditions, including duration of application, under which the drug kills all such specific kinds of micro-organisms in the vegetative or other active form with which it comes in contact when so used.

FALSE ADVERTISEMENT

Section 9. (a) An advertisement of a food, drug, or cos-

metic shall be deemed to be false if in any particular it is untrue, or by ambiguity or inference creates a misleading impression regarding such food, drug, or cosmetic.

(b) An advertisement of a drug shall also be deemed to be false if it includes (1) the name of any disease for which the drug is not a specific cure but is a palliative, and fails to state with equal prominence and in immediate connection with such name that the drug is not a cure for such disease; or (2) any representation, directly or by ambiguity or inference, concerning the effect of such drug which is contrary to the general agreement of medical opinion.

(c) To discourage the public advertisement for sale in interstate commerce of drugs for diseases wherein self-medication may be especially dangerous, or patently contrary to the interests of public health, any advertisement of a drug representing it directly or by ambiguity or inference to have any effect in the treatment of any of the following diseases shall be deemed to be false: Albuminuria, appendicitis, arteriosclerosis, blood poison, bone diseases, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis, prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infections, smallpox, tuberculosis, tumors, typhoid, uremia, venereal diseases, whooping cough; except that no advertisement shall be deemed to be false under this paragraph if it is disseminated to members of the medical and pharmacological professions only or appears in scientific periodicals: Provided, That whenever the Secretary, after notice and hearing, determines that an advance in medical science has made any type of self-medication safe as to any of the diseases enumerated above, he may by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as he may deem necessary in the interests of public health: Provided further, That whenever the Secretary, after notice and hearing, determines that self-medication for diseases other than those herein named may be especially dangerous, or patently contrary to the interest of public health, he is hereby authorized to promulgate regulations designating such other diseases as diseases within the meaning of this paragraph: Provided further, That this paragraph shall not be construed as indicating that self-medication for diseases other than those named herein or designated by regulations of the Secretary under the authority hereof is safe or efficacious.

TOLERANCES FOR POISONOUS INGREDIENTS IN FOOD AND
COSMETICS AND CERTIFICATION OF COAL-TAR
COLORS FOR FOOD

Section 10. (a) If the Secretary finds that the presence

of an added poisonous or added deleterious substance in or on food or cosmetics is or may be injurious to health, taking into account other ways in which the consumer or user may partake of or be exposed to the same or other poisonous or deleterious substances, then the Secretary shall by regulations promulgated after notice and hearing prohibit such added substances in or on food or cosmetics, or establish tolerances limiting the amount therein or thereon, to such extent as he may deem necessary to prevent such injury to health.

(b) The Secretary is hereby authorized to make regulations, after notice and hearing, for the certification of coal-tar colors which he finds to be harmless for use in food.

DEFINITIONS AND STANDARDS FOR FOOD

Section 11. The Secretary is hereby authorized to fix, establish, and promulgate definitions of identity and standards of quality and fill of container for any food. Whenever the Secretary deems that for the purposes of this Act any such definition or standard should be established for any food, he shall give notice of a proposed definition or standard and of the time and place of a public hearing to be held thereon not less than thirty days after the date of such notice. After such public hearing the Secretary may fix, establish, and promulgate a definition or standard for such food. The definition or standard so promulgated shall become effective on a date fixed by the Secretary, which date shall not be prior to ninety days after its promulgation. Any such definition or standard may be amended or repealed after notice and hearing as hereinbefore provided, and if amended or repealed the amendment or repeal shall become effective in the manner and at the time hereinbefore provided.

PERMIT FACTORIES

Section 12. (a) Whenever the Secretary finds that the distribution in interstate commerce of any class of food, drugs, or cosmetics may, by reason of conditions surrounding the manufacture, processing, or packing thereof, be injurious to health, and such injurious nature cannot be adequately determined after such articles have entered interstate commerce, he is authorized, after notice and hearing, to make such regulations governing the conditions of manufacture, processing, or packing as he deems necessary to protect the public health, and requiring manufacturers, processors, and packers of such class of articles to hold a permit conditioned on compliance with such regulations.

(b) The Secretary is authorized to issue such permits for such periods of time as he may by regulations prescribe and to make regulations governing the issuance and renewal thereof. The Secretary is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated.

The Secretary may reinstate the permit whenever, after hearing and inspection of the establishment, it is found that adequate measures have been taken to comply with the conditions of the original permit.

(c) Any officer or employee duly designated by the Secretary shall have access to any factory or establishment, the operator of which holds a permit from the Secretary, for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator.

FACTORY INSPECTION

Section 13. (a) In order adequately to regulate interstate commerce in food, drugs, and cosmetics, and enforce the provisions of this Act, officers or employees duly designated by the Secretary, after first obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter any factory, warehouse, or establishment in which food, drugs, or cosmetics are manufactured, processed, packed, or held for shipment in interstate commerce or are held after such shipment, or to enter any vehicle being used to transport such food, drugs, or cosmetics, in interstate commerce; and (2) to inspect such factory, warehouse, establishment, or vehicle and all equipment, methods, processes, finished and unfinished materials, containers, and labels there used or stored.

(b) (1) The several district courts of the United States are hereby vested with jurisdiction to restrain by injunction, temporary or permanent, the shipment in interstate commerce or delivery after receipt in interstate commerce of any food, drug, or cosmetic from or by any factory, warehouse, establishment, or vehicle, if the owner, operator, or custodian thereof has denied to officers or employees duly designated by the Secretary permission so to enter and inspect such factory, warehouse, establishment, or vehicle and equipment, methods, processes, finished and unfinished materials, containers, and labels there used or stored. Whenever such permission is granted, the injunction issued pursuant to this paragraph shall be dissolved, or may be continued in force subject to such conditions governing the inspection as the court may order; and (2) violation of any such injunction may be summarily tried and punished by the court as a contempt. Such contempt proceedings may be instituted by order of the court or by the filing of an information by the United States attorney.

RECORDS OF INTERSTATE SHIPMENT

Section 14. For the purpose of enforcing the provisions of this Act, carriers subject to the Interstate Commerce Act, as amended (U. S. C., title 49), and other carriers engaged in interstate commerce, and persons receiving food, drugs, or cos-

metics in interstate commerce, shall, upon the request of an officer or employee duly designated by the Secretary, permit such officer or employee to have access to and to copy all records showing the movement in interstate commerce of any food, drug, or cosmetic, and the nature, kind, quantity, shipper and consignee thereof, and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any record so requested: Provided, That evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained.

INVESTIGATIONS AND INSTITUTION OF PROCEEDINGS

Section 15. (a) The Secretary is authorized to conduct examinations and investigations for the purposes of this Act through officers and employees of the Department of Agriculture or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary.

(b) It shall be the duty of each United States attorney to whom the Secretary reports any violation for institution of criminal, libel for condemnation, or other proceedings under this Act, or to whom any health, food, or drug officer of any State or Territory, or political subdivision thereof, presents evidence satisfactory to the United States attorney of any such violation, to cause appropriate proceedings to be instituted in the proper courts of the United States without delay. All suits instituted under this Act shall be by and in the name of the United States.

(c) The Secretary shall, before reporting any violation of this Act to the United States Attorney for institution of criminal proceedings thereunder, afford due notice and opportunity for hearing to interested parties in accordance with such regulations as the Secretary shall prescribe. The report of the Secretary to the United States Attorney for the institution of criminal proceedings under this Act shall be accompanied by findings of the appropriate officers and employees duly authenticated under their oaths.

SEIZURE

Section 16. (a) Any article of food, drug, or cosmetic in interstate commerce that is adulterated or misbranded or that has been manufactured, processed, or packed in a factory or establishment, the operator of which did not, at the time of manufacture, processing, or packing, hold a valid permit if so required by regulations under section 12, shall be liable to be proceeded against while in interstate commerce or at any time thereafter on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found. The article shall be liable to seizure (1) by process pursuant to the libel, or (2) if a chief of station or other officer of the Food and Drug Administration, duly designated

by the Secretary, has probable cause to believe that the article is so adulterated as to be imminently dangerous to health, then by order of such officer, issued under his oath of office, particularly describing the article to be seized, the place where located, and the officer or employee to make the seizure. In case of seizure pursuant to any such order, the jurisdiction of the court shall attach upon such seizure. Any article seized pursuant to any such order shall thereupon be promptly placed in the custody of the court and a libel of information shall be promptly filed for condemnation thereof.

(b) If recovery is had in any suit or proceeding against any officer or employee by reason of a seizure pursuant to any such order, and the court certifies that there is probable cause for the acts done by such officer or employee, or that he acted under the direction of the Secretary or a duly designated officer of the Food and Drug Administration, no execution shall issue against such officer or employee, but the amount so recovered shall upon final judgment, be provided for and paid out of appropriations for the administration of this Act.

(c) The court may, by order at any time before trial, allow any party to a condemnation proceeding to obtain a representative sample of the article seized.

(d) Any article of food, drug, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: Provided, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article of food, drug, or cosmetic shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the party obtaining release of the article under bond. Any article condemned by reason of the manufacturer, processor, or packer not holding a valid permit when so required by regulations under section 12 shall be disposed of by destruction.

(e) The proceedings in cases under this section shall conform, as nearly as may be, to the proceedings in admiralty; except that neither party may demand trial by jury of any issue of fact joined in any such case.

(f) When a decree of condemnation is entered against the

article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any intervening as claimant of the article.

PENALTIES

Section 17. (a) The following Acts are hereby prohibited:

(1) The introduction into interstate commerce of any food, drug, or cosmetic that is adulterated or misbranded.

(2) The receipt in interstate commerce of any food, drug, or cosmetic that is adulterated or misbranded and the delivery or proffered delivery thereof in the original unbroken package for pay or otherwise.

(3) The dissemination of any false advertisement by radio broadcast, United States mails, or in interstate commerce for the purpose of inducing, directly or indirectly, the purchase of food, drugs, or cosmetics.

(4) The dissemination of a false advertisement by any means for the purpose of inducing, directly or indirectly, the sale of food, drugs, or cosmetics in interstate commerce.

(5) The introduction into interstate commerce of any food, drug, or cosmetic if the manufacturer, processor, or packer does not hold a valid permit when so required by regulations under section 12.

(6) The refusal to permit access to or copying of any record as required by section 14.

(b) Any person who violates or causes to be violated any of the provisions of paragraph (a) of this section shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not less than \$100 nor more than \$1,000, or both such imprisonment and fine; and for a second or subsequent offense imprisonment for not more than two years, or a fine of not less than \$500 nor more than \$3,000, or both such imprisonment and fine.

(c) Notwithstanding the provisions of paragraph (b) of this section, in case of a willful offense the penalty shall be imprisonment for not less than six months nor more than three years, or a fine of not less than \$1,000 nor more than \$10,000, or both such imprisonment and fine.

(d) No person acting in the capacity of publisher, advertising agency, or radio broadcast licensee shall be prosecuted under paragraphs (b) or (c) of this section for disseminating a false advertisement if, on request of an officer or employee duly designated by the Secretary, he furnishes the name and post-office address of the person who contracted for or caused him to disseminate such advertisement.

(e) No dealer shall be prosecuted under paragraph (b) of this section if he establishes a guaranty or undertaking signed by the person residing in the United States from whom he received the article of food, drug, or cosmetic, or the advertising copy therefor, to the effect that such person assumes full re-

sponsibility for any violation of this Act, designating it, which may be incurred by the introduction of such article into interstate commerce or by the dissemination of such advertising. To afford protection, such guaranty or undertaking shall contain the name and address of the person furnishing such guaranty or undertaking, and such person shall be amenable to the prosecution and penalties which would attach in due course to the dealer under the provisions of this Act.

(f) Any person who forges, counterfeits, simulates, or falsely represents, or without proper authority uses any mark, stamp, tag, label, or other identification devices authorized by the provisions of sections 12 and 22 of this Act or regulations thereunder, shall be guilty of a misdemeanor, and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not less than \$1,000 nor more than \$5,000, or both such imprisonment and fine.

LIABILITY OF CORPORATE OFFICERS

Section 18. (a) When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, employee, or agent acting for or employed by any person, within the scope of his employment or office, shall in every case be deemed to be the act, omission, or failure of such person, as well as that of the officer, employee, or agent.

(b) Whenever a corporation or association violates any of the provisions of this Act, such violation shall also be deemed to be a violation of the individual directors, officers, or agents of such corporation or association who authorized, ordered, or did any of the acts constituting, in whole or in part, such violation.

INJUNCTION PROCEEDINGS

Section 19. (a) The repetitious introduction into interstate commerce of any adulterated or misbranded food, drug, or cosmetic, or the repetitious dissemination by radio broadcast or United States mail or in interstate commerce of false advertising of any food, drug, or cosmetic, by any person, is hereby declared to be a public nuisance. In order to avoid multiplicity of criminal proceedings with respect to such person or libel for condemnation proceedings with respect to the food, drug, or cosmetic, the district courts of the United States are hereby vested with jurisdiction to restrain by injunction, temporary or permanent, any person from continuing any such nuisance. In such injunction proceedings it shall not be necessary to show on the part of such person an intent to continue such nuisance.

(b) Violation of any such injunction may be summarily tried and punished by the court as a contempt. Such contempt proceedings may be instituted by order of the court or by the filing of an information by the United States attorney; and process of the court for the arrest of the violator may be served at any place in the United States or subject to its jurisdiction.

IMPORTS

Section 20. (a) The Secretary of the Treasury shall deliver to the Secretary of Agriculture upon his request, from time to time, samples of food, drugs, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee who may appear before the Secretary of Agriculture and have the right to introduce testimony. If it appears from the examination of such samples or otherwise that (1) any false advertisement of such food, drug, or cosmetic has been disseminated in the United States within three months prior to the date such article is offered for import, or (2) such article has been manufactured, processed, or packed under unsanitary conditions, or (3) such article is adulterated or misbranded within the meaning of this Act, then such article shall be refused admission.

(b) The Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any such article refused admission, unless such article is exported by the consignee within three months from the date of notice of such refusal, under such regulations as the Secretary of the Treasury may prescribe: Provided, That the Secretary of the Treasury may deliver to the consignee any such article pending examination and decision in the matter on execution of a bond as liquidated damages for the amount of the full invoice value thereof together with the duty thereon, and on refusal to return such article or any part thereof, for any cause to the custody of the Secretary of the Treasury when demanded for the purpose of excluding it from the country or for any other purpose, said consignee shall forfeit the full amount of the bond as liquidated damages.

(c) All charges for storage, cartage, and labor on any article which is refused admission or delivery shall be paid by the owner or consignee and in default of such payment shall constitute a lien against any future importations made by such owner or consignee.

PUBLICITY

Section 21. The Secretary shall cause to be published periodically a report summarizing all judgments, decrees, and orders which have been rendered, and all proceedings instituted and seizures made, including the nature of the charge and the disposition thereof. The Secretary shall cause to be disseminated such information regarding any food, drug, or cosmetic as he deems necessary in the interests of public health and for the protection of the consumer against fraud.

VOLUNTARY INSPECTION SERVICE

Section 22. The Secretary, upon application of any manufacturer or packer of any food, drug, or cosmetic sold in interstate commerce, may at his discretion, designate supervisory inspectors to examine and inspect all premises, equipment,

methods, materials, containers, and labels used by such applicant in the production of food, drugs, or cosmetics. If upon such examination the food, drug, or cosmetic is found to conform to the requirements of this Act, the applicant may be authorized, in accordance with regulations prescribed by the Secretary, to mark the food, drug, or cosmetic so as to indicate such conformity and such other facts relating to the identity or quality of the food, drug, or cosmetic as the regulations may provide. Services to any applicant under this section shall be rendered only upon the payment of fees to be fixed by regulations of the Secretary in such amount as to cover the cost of the supervisory inspection and examination, together with the reasonable costs of administration (including costs of establishing under section 11 additional definitions and standards for the purposes of this section) incurred by the Secretary in carrying out this section. Receipts from such fees shall be covered into the Treasury and shall be available to the Secretary for expenditures incurred in carrying out this section.

GENERAL ADMINISTRATIVE PROVISIONS

Section 23. (a) The Secretary of Agriculture is authorized to prescribe such regulations as he may deem necessary for the efficient enforcement of the functions vested in him by the provisions of this Act (other than the provisions of section 20), including regulations with the force and effect of law as to notice and conduct of hearings by the Secretary. The Secretary of the Treasury and the Secretary of Agriculture shall jointly prescribe such regulations as they may deem necessary for the efficient enforcement of the provisions of section 20. Regulations prescribed under this Act shall be promulgated in such manner and take effect at such time as the Secretary of Agriculture (and, in appropriate cases, the Secretary of the Treasury) shall determine.

(b) For the efficient administration of the provisions of this Act, the provisions, including penalties, of sections 9 and 10 of the Federal Trade Commission Act, approved September 26, 1914 (U. S. C., title 49, secs. 49 and 50), are made applicable to the jurisdiction, powers, and duties of the Secretary under this Act and to any person subject to the provisions of this Act, whether or not a corporation.

(c) Hearings authorized or required by this Act shall be conducted by the Secretary or such officer or employee as he may designate for the purpose. The findings of fact by the Secretary shall be conclusive if in accordance with law.

LIABILITY FOR PERSONAL INJURIES

Section 24. A right of action for damages shall accrue to any person for injury or death proximately caused by a violation of this Act.

SEPARABILITY CLAUSE

Section 25. If any provision of this Act is declared uncon-

stitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE AND REPEALS

Section 26. (a) This Act shall take effect six months after the date of approval. The Federal Food and Drugs Act of June 30, 1906, as amended, (U. S. C., title 21, secs. 1-15) shall remain in force until such effective date, and is hereby repealed effective upon such date: Provided, That upon the approval of this Act and before its effective date the Secretary is authorized to conduct hearings and to promulgate regulations, definitions, and standards under the provisions hereof which shall become effective on or after the effective date of this Act as the Secretary shall direct.

(b) The provisions of this Act shall not be held to modify or repeal but shall be held in addition to the provisions of the following Acts, as amended: The Tea Import Act, approved March 2, 1897 (U. S. C., title 21, secs. 41-50); the Virus Act, approved March 4, 1913 (U. S. C., title 21, secs. 151-158); the United States Grain Standards Act, approved August 11, 1916 (U. S. C., title 7, secs. 70-87); the Insecticide Act, approved April 26, 1910 (U. S. C., title 7, secs. 121-134); the Import Milk Act, approved February 13, 1927 (U. S. C., title 21, secs. 141-149); the Caustic Poison Act, approved March 4, 1927 (U. S. C., title 15, secs. 401-411); the Virus, Serum, Toxin and Antitoxin Act, approved July 1, 1902 (U. S. C., title 42, secs. 141-148).

FEDERAL FOOD, DRUG, AND COSMETIC ACT OF JUNE 25, 1938

1938, C. 675, 52 Stat. 1040
[S. 5, 75th Cong., 3d Sess., 1938]

AN ACT

To prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices, and cosmetics, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER I—SHORT TITLE

Section 1. This Act may be cited as the Federal Food, Drug, and Cosmetic Act.

CHAPTER II—DEFINITIONS

Section 201. For the purposes of this Act—

(a) The term "Territory" means any Territory or possession of the United States, including the District of Columbia and excluding the Canal Zone.

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

(c) The term "Department" means the Department of Agriculture of the United States.

(d) The term "Secretary" means the Secretary of Agriculture.

(e) The term "person" includes individual, partnership, corporation, and association.

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

(h) The term "device" (except when used in paragraph (n) of this section and in sections 301(i), 403(f), 502(c), and 602(c)) means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

(i) The term "cosmetic" means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

(j) The term "official compendium" means the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them.

(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(l) The term "immediate container" does not include package liners.

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combinations thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

(o) The representation of a drug, in its labeling, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

(p) The term "new drug" means—

(1) Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to the enactment of this Act it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) Any drug the composition of which is such that such drug, as a result of investigations to determine its safety for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.

CHAPTER III—PROHIBITED ACTS AND PENALTIES PROHIBITED ACTS

Section 301. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 404 or 505.

(e) The refusal to permit access to or copying of any record as required by section 703.

(f) The refusal to permit entry or inspection as authorized by section 704.

(g) The manufacture within any Territory of any food, drug, device, or cosmetic that is adulterated or misbranded.

(h) The giving of a guaranty or undertaking referred to in section 303(c) (2), which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 303(c) (3), which guaranty or undertaking is false.

(i) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of section 404, 406 (b), 504, or 604.

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under authority of section 404, 505, or 704 concerning any method or process which as a trade secret is entitled to protection.

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

(l) The using, on the labeling of any drug or in any advertising relating to such drug, of any representation or suggestion that an application with respect to such drug is effective under section 505, or that such drug complies with the provisions of such section.

INJUNCTION PROCEEDINGS

Section 302. (a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful

restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., 1934 ed., title 28, sec. 381), to restrain violations of section 301, except paragraphs (e), (f), (h), (i), and (j).

(b) In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this Act, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 22 of such Act of October 15, 1914, as amended (U. S. C., 1934 ed., title 28, sec. 387).

PENALTIES

Section 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 301(a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301(a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, or to the effect, in case of an alleged violation of section 301(d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce; or (3) for having violated section 301(a), where the violation exists because the article is adulterated by reason of containing a coal-tar color not from a batch certified in accordance with

regulations promulgated by the Secretary under this Act, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the coal-tar color, to the effect that such color was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this Act.

SEIZURE

Section 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 404 or 505, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: Provided, however, That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order; unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same

claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

(c) The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained.

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: Provided, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under section 404 or 505, be introduced into interstate commerce, shall be disposed of by destruction.

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed.

HEARING BEFORE REPORT OF CRIMINAL VIOLATION

Section 305. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

REPORT OF MINOR VIOLATIONS

Section 306. Nothing in this Act shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this Act whenever he believes that the public interest will be adequately served by a suitable written notice or warning.

PROCEEDINGS IN NAME OF UNITED STATES: PROVISION AS TO SUBPENAS

Section 307. All such proceedings for the enforcement, or to restrain violations, of this Act shall be by and in the name of the United States. Notwithstanding the provisions of section 876 of the Revised Statutes, subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district in any such proceeding.

CHAPTER IV—FOOD

DEFINITIONS AND STANDARDS FOR FOOD

Section 401. Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: Provided, That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be estab-

lished for avocados, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Secretary shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the prescribing of any standard of quality for any canned fruit or canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. Any definition and standard of identity prescribed by the Secretary for avocados, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing.

ADULTERATED FOOD

Section 402. A food shall be deemed to be adulterated—

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 406; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; or (5) if it is, in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(c) If it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 406: Provided, That this paragraph shall not apply to citrus fruit bearing or containing a coal-tar color if application for listing of such color has been

made under this Act and such application has not been acted on by the Secretary, if such color was commonly used prior to the enactment of this Act for the purpose of coloring citrus fruit.

(d) If it is confectionery, and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of 1 per centum, natural gum, and pectin: Provided, That this paragraph shall not apply to any confectionery by reason of its containing less than one-half of 1 per centum by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.

MISBRANDED FOOD

Section 403. A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If it is offered for sale under the name of another food.

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

(d) If its container is so made, formed, or filled as to be misleading.

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(f) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under direct customary conditions of purchase and use.

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

(h) If it purports to be or is represented as—

(1) a food for which a standard of quality has been prescribed by regulations as provided by section 401, and its

quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

(2) a food for which a standard or standards of fill of container have been prescribed by regulations as provided by section 401, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.

(i) If it is not subject to the provisions of paragraph (g) of this section unless its label bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings without naming each: Provided, That, to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary.

(j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Secretary determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses.

(k) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: Provided, That to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary. The provisions of this paragraph and paragraphs (g) and (i) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream.

EMERGENCY PERMIT CONTROL

Section 404. (a) Whenever the Secretary finds after investigation that the distribution in interstate commerce of any class of food may, by reason of contamination with microorganisms during the manufacture, processing, or packing thereof in any locality, be injurious to health, and that such injurious nature cannot be adequately determined after such articles have entered interstate commerce, he then, and in such case only, shall promulgate regulations providing for the issuance, to manufacturers, processors, or packers of such class of food in such locality, of permits to which shall be attached such conditions governing the manufacture, processing, or packing of such class of food, for such temporary period of time, as may be necessary to protect the public health; and after the effective date of such regulations, and during such temporary

period, no person shall introduce or deliver for introduction into interstate commerce any such food manufactured, processed, or packed by any such manufacturer, processor, or packer unless such manufacturer, processor, or packer holds a permit issued by the Secretary as provided by such regulations.

(b) The Secretary is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the Secretary shall, immediately after prompt hearing and an inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit, as originally issued or as amended.

(c) Any officer or employee duly designated by the Secretary shall have access to any factory or establishment, the operator of which holds a permit from the Secretary, for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator.

REGULATIONS MAKING EXEMPTIONS

Section 405. The Secretary shall promulgate regulations exempting from any labeling requirement of this Act (1) small open containers of fresh fruits and fresh vegetables and (2) food which is, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such food is not adulterated or misbranded under the provisions of this Act upon removal from such processing, labeling, or repacking establishment.

TOLERANCES FOR POISONOUS INGREDIENTS IN FOOD AND CERTIFICATION OF COAL-TAR COLORS FOR FOOD

Section 406. (a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 402(a); but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) of section 402(a). While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing

any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 402(a). In determining the quantity of such added substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

(b) The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in food and for the certification of batches of such colors, with or without harmless diluents.

CHAPTER V—DRUGS AND DEVICES ADULTERATED DRUGS AND DEVICES

Section 501. A drug or device shall be deemed to be adulterated—

(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) if it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or (3) if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (4) if it is a drug and it bears or contains, for purposes of coloring only, a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 504.

(b) If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in such compendium, except that whenever tests or methods of assay have not been prescribed in such compendium, or such tests or methods of assay as are prescribed are, in the judgment of the Secretary, insufficient for the making of such determination, the Secretary shall bring such fact to the attention of the appropriate body charged with the revision of such compendium, and if such body fails within a reasonable time to prescribe tests or methods of assay which, in the judgment of the Secretary, are sufficient for purposes of this paragraph, then the Secretary shall promulgate regulations prescribing appropriate tests or methods of assay in accordance with which such determination as to strength, quality, or purity shall be made. No drug defined in an official compendium shall be deemed to be adulterated un-

der this paragraph because it differs from the standard of strength, quality, or purity therefor set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homoeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homoeopathic drug, in which case it shall be subject to the provisions of the Homoeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

(c) If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

(d) If it is a drug and any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor.

MISBRANDED DRUGS AND DEVICES

Section 502. A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(d) If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaïne, barbituric acid, beta eucaïne, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name, quantity, and percentage of such substance or derivative and in juxtaposition therewith the statement "Warning—May be habit forming."

(e) If it is a drug and it is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be; and (2), in case it is fabricated from two or more ingredients, the common or usual name of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including, whether active or not, the name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atrophine, hyoscyne, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: Provided, That to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary.

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement.

(g) If it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: Provided, That the method of packing may be modified with the consent of the Secretary. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homoeopathic Pharmacopoeia of the United States, it shall be subject to the requirements of the United States Pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homoeopathic drug, in which case it shall be subject to the provisions of the Homoeopathic Pharmacopoeia of the United States, and not to those of the United States Pharmacopoeia.

(h) If it has been found by the Secretary to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Secretary shall by regulations require as necessary for the protection of the public health. No such regulation shall be established for any drug recognized in an official compendium until the Secretary shall have informed the appropriate body charged with the revisions of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

(i) (1) If it is a drug and its container is so made, formed, or filled as to be misleading; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug.

(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

EXEMPTIONS IN CASE OF DRUGS AND DEVICES

Section 503. (a) The Secretary is hereby directed to promulgate regulations exempting from any labeling or packaging requirement of this Act drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such drugs and devices are not adulterated or misbranded under the provisions of this Act upon removal from such processing, labeling, or repacking establishment.

(b) A drug dispensed on a written prescription signed by a physician, dentist, or veterinarian (except a drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail), shall if—

(1) such physician, dentist, or veterinarian is licensed by law to administer such drug, and

(2) such drug bears a label containing the name and place of business of the dispenser, the serial number and date of such prescription, and the name of such physician, dentist, or veterinarian,

be exempt from the requirements of section 502(b) and (e), and (in case such prescription is marked by the writer thereof as not refillable or its refilling is prohibited by law) of section 502(d).

CERTIFICATION OF COAL-TAR COLORS FOR DRUGS

Section 504. The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in drugs for purposes of coloring only and for the certification of batches of such colors, with or without harmless diluents.

NEW DRUGS

Section 505. (a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such person shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a

full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

(c) An application provided for in subsection (b) shall become effective on the sixtieth day after the filing thereof unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing thereof) as the Secretary deems necessary to enable him to study and investigate the application.

(d) If the Secretary finds, after due notice to the applicant and giving him an opportunity for a hearing, that (1) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b), do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; or (4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions, he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

(e) The effectiveness of an application with respect to any drug shall, after due notice and opportunity for hearing to the applicant, by order of the Secretary be suspended if the Secretary finds (1) that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under the conditions of use upon the basis of which the application became effective, or (2) that the application contains any untrue statement of a material fact. The order shall state the findings upon which it is based.

(f) An order refusing to permit an application with respect to any drug to become effective shall be revoked whenever the Secretary finds that the facts so require.

(g) Orders of the Secretary issued under this section shall be served (1) in person by any officer or employee of the de-

partment designated by the Secretary or (2) by mailing the order by registered mail addressed to the applicant or respondent at his last-known address in the records of the Secretary.

(h) An appeal may be taken by the applicant from an order of the Secretary refusing to permit the application to become effective, or suspending the effectiveness of the application. Such appeal shall be taken by filing in the district court of the United States within any district wherein such applicant resides or has his principal place of business, or in the District Court of the United States for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be set aside. A copy of such petition shall be forthwith served upon the Secretary, or upon any officer designated by him for that purpose, and thereupon the Secretary shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm or set aside such order. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence shall be conclusive. If any person shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified findings which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the setting aside of the original order. The judgment and decree of the court affirming or setting aside any such order of the Secretary shall be final, subject to review as provided in sections 128, 239, and 240 of the Judicial Code, as amended (U. S. C., 1934 ed., title 28, secs. 225, 346, and 347), and in section 7, as amended, of the Act entitled "An Act to establish a Court of Appeals for the District of Columbia," approved February 9, 1893 (D. C. Code, title 18, sec. 26). The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

(i) The Secretary shall promulgate regulations for exempting from the operation of this section drugs intended solely

for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs.

CHAPTER VI—COSMETICS
ADULTERATED COSMETICS

Section 601. A cosmetic shall be deemed to be adulterated—

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual: Provided, That this provision shall not apply to coal-tar hair dye, the label of which bears the following legend conspicuously displayed thereon: "Caution—This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness", and the labeling of which bears adequate directions for such preliminary testing. For the purposes of this paragraph and paragraph (e) the term "hair dye" shall not include eyelash dyes or eyebrow dyes.

(b) If it consists in whole or in part of any filthy, putrid, or decomposed substance.

(c) If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

(d) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(e) If it is not a hair dye and it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 604.

MISBRANDED COSMETICS

Section 602. A cosmetic shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(d) If its container is so made, formed, or filled as to be misleading.

REGULATIONS MAKING EXEMPTIONS

Section 603. The Secretary shall promulgate regulations exempting from any labeling requirement of this Act cosmetics which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such cosmetics are not adulterated or misbranded under the provisions of this Act upon removal from such processing, labeling, or repacking establishment.

CERTIFICATION OF COAL-TAR COLORS FOR COSMETICS

Section 604. The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in cosmetics and for the certification of batches of such colors, with or without harmless diluents.

CHAPTER VII—GENERAL ADMINISTRATIVE PROVISIONS REGULATIONS AND HEARINGS

Section 701. (a) The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Secretary.

(b) The Secretary of the Treasury and the Secretary of Agriculture shall jointly prescribe regulations for the efficient enforcement of the provisions of section 801, except as otherwise provided therein. Such regulations shall be promulgated in such manner and take effect at such time, after due notice, as the Secretary of Agriculture shall determine.

(c) Hearings authorized or required by this Act shall be conducted by the Secretary or such officer or employee as he may designate for the purpose.

(d) The definitions and standards of identity promulgated in accordance with the provisions of this Act shall be effective for the purposes of the enforcement of this Act, notwithstanding such definitions and standards as may be contained in other laws of the United States and regulations promulgated thereunder.

(e) The Secretary, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of this Act: 401, 403(j), 404(a), 406(a) and (b), 501(b), 502(d), 502(h), 504, and 604. The Secretary shall give appropriate notice of the hearing, and the notice shall set forth the proposal in general terms and specify the time and place for a public hearing to be held thereon not less than thirty days after the date of the notice, except that the public hearing on regulations under section 404(a) may be held within a reasonable time, to be fixed

by the Secretary, after notice thereof. At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Secretary shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Secretary shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. No such order shall take effect prior to the ninetieth day after it is issued, except that if the Secretary finds that emergency conditions exist necessitating an earlier effective date, then the Secretary shall specify in the order his findings as to such conditions and the order shall take effect at such earlier date as the Secretary shall specify therein to meet the emergency.

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. The summons and petition may be served at any place in the United States. The Secretary, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Secretary based his order.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law.

The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(g) A certified copy of the transcript of the record and proceedings under subsection (e) shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, libel for condemnation, exclusion of imports, or other proceeding arising under or in respect to this Act, irrespective of whether proceedings with respect to the order have previously been instituted or become final under subsection (f).

EXAMINATIONS AND INVESTIGATIONS

Section 702. (a) The Secretary is authorized to conduct examinations and investigations for the purposes of this Act through officers and employees of the Department or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department. In the case of food packed in a Territory the Secretary shall attempt to make inspection of such food at the first point of entry within the United States when, in his opinion and with due regard to the enforcement of all the provisions of this Act, the facilities at his disposal will permit of such inspection. For the purposes of this subsection the term "United States" means the States and the District of Columbia.

(b) Where a sample of a food, drug, or cosmetic is collected for analysis under this Act the Secretary shall, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; except that the Secretary is authorized, by regulations, to make such reasonable exceptions from, and impose such reasonable terms and conditions relating to, the operation of this subsection as he finds necessary for the proper administration of the provisions of this Act.

(c) For purposes of enforcement of this Act, records of any department or independent establishment in the executive

branch of the Government shall be open to inspection by any official of the Department of Agriculture duly authorized by the Secretary to make such inspection.

RECORDS OF INTERSTATE SHIPMENT

Section 703. For the purpose of enforcing the provisions of this Act, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Secretary, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates: Provided, That evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained: Provided further, That carriers shall not be subject to the other provisions of this Act by reason of their receipt, carriage, holding, or delivery of food, drugs, devices, or cosmetics in the usual course of business as carriers.

FACTORY INSPECTION

Section 704. For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein.

PUBLICITY

Section 705. (a) The Secretary shall cause to be published from time to time reports summarizing all judgments, decrees, and court orders which have been rendered under this Act, including the nature of the charge and the disposition thereof.

(b) The Secretary may also cause to be disseminated information regarding food, drugs, devices, or cosmetics in situa-

tions involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer. Nothing in this section shall be construed to prohibit the Secretary from collecting, reporting, and illustrating the results of the investigations of the Department.

COST OF CERTIFICATION OF COAL-TAR COLORS

Section 706. The admitting to listing and certification of coal-tar colors, in accordance with regulations prescribed under this Act, shall be performed only upon payment of such fees, which shall be specified in such regulations, as may be necessary to provide, maintain, and equip an adequate service for such purposes.

CHAPTER VIII—IMPORTS AND EXPORTS

Section 801. (a) The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony. If it appears from the examination of such samples or otherwise that (1) such article has been manufactured, processed, or packed under insanitary conditions, or (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated, misbranded, or in violation of section 505, then such article shall be refused admission. This paragraph shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under section 2 of the Act of May 26, 1922, as amended (U. S. C., 1934 edition, title 21, sec. 173).

(b) The Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any such article refused admission, unless such article is exported by the consignee within three months from the date of notice of such refusal, under such regulations as the Secretary of the Treasury may prescribe: Provided, That the Secretary of the Treasury may deliver to the consignee any such article pending examination and decision in the matter on execution of a bond as liquidated damages for the amount of the full invoice value thereof together with the duty thereon and on refusing for any cause to return such article or any part thereof to the custody of the Secretary of the Treasury when demanded for the purpose of excluding it from the country or for any other purpose, such consignee shall forfeit the full amount of the bond as liquidated damages.

(c) All charges for storage, cartage, and labor on any article which is refused admission or delivery shall be paid by the owner or consignee and in default of such payment shall constitute a lien against any future importations made by such owner or consignee.

(d) A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Act if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act.

CHAPTER IX—MISCELLANEOUS SEPARABILITY CLAUSE

Section 901. If any provision of this Act is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE AND REPEALS

Section 902. (a) This Act shall take effect twelve months after the date of its enactment. The Federal Food and Drugs Act of June 30, 1906, as amended (U. S. C., 1934 ed., title 21, secs. 1-15), shall remain in force until such effective date, and, except as otherwise provided in this subsection, is hereby repealed effective upon such date: Provided, That the provisions of section 701 shall become effective on the enactment of this Act, and thereafter the Secretary is authorized hereby to (1) conduct hearings and to promulgate regulations which shall become effective on or after the effective date of this Act as the Secretary shall direct, and (2) designate prior to the effective date of this Act food having common or usual names and exempt such food from the requirements of clause (2) of section 403(i) for a reasonable time to permit the formulation, promulgation, and effective application of definitions and standards of identity therefor as provided by section 401: Provided further, That sections 502(j), 505, and 601(a), and all other provisions of this Act to the extent that they may relate to the enforcement of such sections, shall take effect on the date of the enactment of this Act, except that in the case of a cosmetic to which the proviso of section 601(a) relates, such cosmetic shall not, prior to the ninetieth day after such date of enactment, be deemed adulterated by reason of the failure of

its label to bear the legend prescribed in such proviso: Provided further, That the Act of March 4, 1923 (U. S. C., 1934 ed., title 21, sec. 6; 42 Stat. 1500, ch. 268), defining butter and providing a standard therefor; the Act of July 24, 1919 (U. S. C., 1934 ed., title 21, sec. 10; 41 Stat. 271, ch. 26), defining wrapped meats as in package form; and the amendment to the Food and Drugs Act, section 10A, approved August 27, 1935, (U. S. C., 1934 ed., Sup. III, title 21, sec. 14a), shall remain in force and effect and be applicable to the provisions of this Act.

(b) Meats and meat food products shall be exempt from the provisions of this Act to the extent of the application or the extension thereto of the Meat Inspection Act, approved March 4, 1907, as amended (U. S. C., 1934 ed., title 21, secs. 71-91; 34 Stat. 1260 et seq.).

(c) Nothing contained in this Act shall be construed as in any way affecting, modifying, repealing, or superseding the provisions of the virus, serum, and toxin Act of July 1, 1902 (U. S. C., 1934 ed., title 42, chap. 4); the Filled Cheese Act of June 6, 1896 (U. S. C., 1934 ed., title 26, ch. 10), the Filled Milk Act of March 4, 1923 (U. S. C., 1934 ed., title 21, ch. 3, secs. 61-63); or the Import Milk Act of February 15, 1927 (U. S. C., 1934 ed., title 21, ch. 4, secs. 141-149).

(d) In order to carry out the provisions of this Act which take effect prior to the repeal of the Food and Drugs Act of June 30, 1906, as amended, appropriations available for the enforcement of such Act of June 30, 1906, are also authorized to be made available to carry out such provisions.

THE FEDERAL TRADE COMMISSION [WHEELER-LEA] ACT

1938, C. 49, 52 Stat. 111
[S. 1077, 75th Cong., 3d Sess., 1938]

* * *

Section 3. Section 5 of * * * [the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 5541] Act, as amended (U. S. C., 1934 ed., title 15, sec. 45), is hereby amended to read as follows:

"Section 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in com-

merce and unfair or deceptive acts or practices in commerce.

“(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceedings by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of

appeals of the United States, in the manner provided in subsection (c) of this section.

“(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

“(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

“(e) Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

“(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

“(g) An order of the Commission to cease and desist shall become final—

“(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

“(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

“(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

“(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

“(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order cor-

rected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

“(i) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

“(j) If the Supreme Court ordered a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

“(k) As used in this section the term ‘mandate’, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

“(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.”

Section 4. Such Act is further amended by adding at the end thereof new sections to read as follows:

“Section 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

“(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

“(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

“(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection

(a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

"Section 13. (a) Whenever the Commission has reason to believe—

"(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

"(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

"(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

"(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

"Section 14. (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than six months, or by both such

fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: Provided, That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official 'establishments.'

"(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement.

"Section 15. For the purposes of sections 12, 13, and 14—

"(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

"(b) The term 'food' means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such articles.

“(c) The term ‘drugs’ means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

“(d) The term ‘device’ (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

“(e) The term ‘cosmetic’ means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap.

“Section 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (1) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.”

* * *

FEDERAL REGULATION OF LOBBYING ACT^{1A}

60 Stat. 839-842, 2 U. S. C. §§ 261-270 (1946)

SHORT TITLE

Section 301. This title may be cited as the “Federal Regulation of Lobbying Act”.

DEFINITIONS

Section 302. When used in this title—

(a) The term “contribution” includes a gift, subscription, loan, advance, or deposit of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

(b) The term “expenditure” includes a payment, distribution, loan, advance, deposit, or gift of money or anything of

^{1A} The footnotes are renumbered.

value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(c) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.

(d) The term "Clerk" means the Clerk of the House of Representatives of the United States.

(e) The term "legislation" means bills, resolutions, amendments, nominations, and other matters pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House.

DETAILED ACCOUNTS OF CONTRIBUTIONS

Section 303. (a) It shall be the duty of every person who shall in any manner solicit or receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of—

(1) all contributions of any amount or of any value whatsoever;

(2) the name and address of every person making any such contribution of \$500 or more and the date thereof;

(3) all expenditures made by or on behalf of such organization or fund; and

(4) the name and address of every person to whom any such expenditure is made and the date thereof.

(b) It shall be the duty of such person to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding \$10 in amount, and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

RECEIPTS FOR CONTRIBUTIONS

Section 304. Every individual who receives a contribution of \$500 or more for any of the purposes hereinafter designated shall within five days after receipt thereof render to the person or organization for which such contribution was received a detailed account thereof, including the name and address of the person making such contribution and the date on which received.

STATEMENTS TO BE FILED WITH CLERK OF HOUSE

Section 305. (a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing—

(1) the name and address of each person who has made a contribution of \$500 or more not mentioned in the pre-

ceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of \$500 or more to such person since the effective date of this title;

(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

(3) the total sum of all contributions made to or for such person during the calendar year;

(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of \$10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

STATEMENT PRESERVED FOR TWO YEARS

Section 306. A statement required by this title to be filed with the Clerk—

(a) shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia, but in the event it is not received, a duplicate of such statement shall be promptly filed upon notice by the Clerk of its nonreceipt;

(b) shall be preserved by the Clerk for a period of two years from the date of filing, shall constitute part of the public records of his office, and shall be open to public inspection.

PERSONS TO WHOM APPLICABLE

Section 307. The provisions of this title shall apply to any person (except a political committee as defined in the Federal Corrupt Practices Act,¹ and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the prin-

¹ 43 Stat. 1070 (1925), 2 U. S. C. §§ 241-256 (1946), as amended by 62 Stat. 862 (1948).

cipal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

REGISTRATION WITH SECRETARY OF THE SENATE AND CLERK OF THE HOUSE

Section 308. (a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States, shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said

Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

REPORTS AND STATEMENTS TO BE MADE UNDER OATH

Section 309. All reports and statements required under this title shall be made under oath, before an officer authorized by law to administer oaths.

PENALTIES

Section 310. (a) Any person who violates any of the provisions of this title, shall, upon conviction, be guilty of a misdemeanor, and shall be punished by a fine of not more than \$5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

EXEMPTION

Section 311. The provisions of this title shall not apply to practices or activities regulated by the Federal Corrupt Practices Act² nor be construed as repealing any portion of said Federal Corrupt Practices Act.

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

1946, C. 324, 60 Stat. 237

AN ACT

To improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE

Section 1. This Act may be cited as the "Administrative Procedure Act".

² *Ibid.*

DEFINITIONS

Section 2. As used in this Act—

(a) **Agency.**—“Agency” means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) **Person and Party.**—“Person” includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. “Party” includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) **Rule and Rule Making.**—“Rule” means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. “Rule making” means agency process for the formulation, amendment, or repeal of a rule.

(d) **Order and Adjudication.**—“Order” means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. “Adjudication” means agency process for the formulation of an order.

(e) **License and Licensing.**—“License” includes the whole or part of any agency permit, certificate, approval, registration,

charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) **Sanction and Relief.**—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) **Agency Proceeding and Action.**—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Section 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) **Rules.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **Opinions and Orders.**—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) **Public Records.**—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

RULE MAKING

Section 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) **Notice.**—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **Procedures.**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **Effective dates.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and

statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **Petitions.**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Section 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) **Notice.**—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) **Procedure.**—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) **Separation of Functions.**—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any

officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) **Declaratory Orders.**—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

Section 6. Except as otherwise provided in this Act—

(a) **Appearance.**—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) **Investigations.**—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) **Subpenas.**—Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) **Denials.**—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

Section 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) **Presiding officers.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **Hearing powers.**—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) **Evidence.**—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) **Record.**—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

Section 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) **Action by subordinates.**—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency

may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its function imperatively and unavoidably so requires.

(b) **Submittals and decisions.**—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

Section 9. In the exercise of any power or authority—

(a) **In General.**—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) **Licenses.**—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such actions shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

Section 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **Right of review.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) **Form and venue of action.**—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) **Reviewable acts.**—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) **Interim relief.**—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) **Scope of review.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of

any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

Section 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committee as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT

Section 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal ad-

ditional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

